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In the Supreme Court of the United States

OCTOBER TERM, 1993

JANET M. CLARK,
PETITIONER,

v.

DEPARTMENT OF THE ARMY,
RESPONDENT.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Federal Circuit departed from accepted judicial practice by failing to grant deference to the Merit Systems Protection Board's interpretation of the burdens of proof under the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1)?[1]

2. Whether the Court of Appeals for the Federal Circuit, as the sole reviewing court of final orders of the Merit Systems Protection Board, is in conflict with itself in its interpretation of the burdens of proof under the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), in the decisions of *Clark* v. *Department of the Army*, 977 F.2d 1466 (Fed. Cir. 1993) and *Marano* v. *Department of Justice*, -- F.2d --, 1993 WL 290043 (Fed. Cir. 1993)?

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[1] The parties below are reflected in the caption: Janet M. Clark and the Department of the Army.

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OPINION BELOW

An initial decision in this case was issued by an Administrative Judge of the Merit Systems Protection Board, Chicago Regional Office, on January 17, 1992. *Clark* v. *Department of the Army*, MSPB Docket Numbers CH-0752-91-0717-I-1; CH-0752-91-0797-I-1. The opinion of the Administrative Judge, which is not published in any reporter,[2] appears in the Appendix.[3] The July 1, 1993 opinion of the Court of Appeals, reported at 997 F.2d 1466, appears in the Appendix.[4]

[2] The decisions of the Merit Systems Protection Board are published in the Merit Systems Protection Reporter ("M.S.P.R."), West Publishing Co. However, the M.S.P.R. only contains decisions issued by the full Board. The initial decisions of Merit Systems Protection Board administrative judges are not subject to publication.

[3] App. at A-17 to A-36.

[4] App. at A-1 to A-16.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on July 1, 1993. No petition for rehearing or rehearing *en banc* was filed.[5] This petition for certiorari was filed within ninety days from July 1, 1993. Jurisdiction of this Court is invoked pursuant to 28 U.S.C.S. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of 5 U.S.C.S. § 2302(b)(8), which provides:

> Any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-
>
> > (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-
> >
> > > (A) any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences-

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[5] Petitioner has been out of work since her removal from the federal service in July 1991. She has been subject to substantial legal expenses in pursuing her appeal, including a two-day hearing before the Board, and an appeal to the Court of Appeals for the Federal Circuit. In light of the fact that there was no dissent in the Court's opinion in her case, petitioner was forced to choose between seeking rehearing and seeking certiorari. Petitioner has been represented by the same counsel throughout these proceedings, who has contributed significant hours in pursuit of petitioner's appeal rights and helped petitioner raise money to defray the costs of this petition. Because of the public importance of the issues raised in this petition for certiorari, petitioner's failure to seek rehearing, or rehearing *en banc*, should not negatively impact on this Court's decision to grant or deny her petition for certiorari.

> (i) a violation of any law, rule, or regulation, or
> (ii) a gross management, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety...

It further involves the interpretation of 5 U.S.C.S. § 1221(e), which provides:

> (1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under 2302(b)(8), the [Merit Systems Protection] Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.
>
> (2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

STATEMENT OF THE CASE

Petitioner Janet M. Clark ("Clark") had been employed by the Respondent Department of the Army ("Agency") for approximately 26 years at the time of her removal.[6] Beginning in 1986, while she was a Production Controller, GS-8,[7] at the Savanna Army Depot Activity ("SADA") in Savanna, Illinois,

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[6] App. at A-2.

[7] "GS" refers to the General Schedule, which is a position classification system in the federal government. See, 5 U.S.C. § 5332.

Clark began making a series of complaints to the Army's Office of Inspector General[8] ("OIG").[9]

In mid-1989, Clark was reassigned to the position of Computer Assistant, GS-8, SADA. Shortly thereafter, SADA had a change in command. Lt. Col. John Phillis, Jr. became Commander at SADA, and Captain Michael Demcko became Chief of Mission Division and Clark's immediate supervisor.[10] Clark then initiated a series of complaints both directly to Lt. Col. Phillis and Captain Demcko, and also to the OIG. In the fall of 1989, Clark made both Lt. Col. Phillis and Captain Demcko aware of the use of "bootleg" software on government computers at SADA.[11] Between October 1989 and February 1991, Clark also brought a series of complaints to the attention of Lt. Col. Phillis, Captain Demcko and Colonel William Shirley, Inspector General for Depot Systems Command. Those complaints included the improper order of safety shoes and prescription safety glasses through local purchase instead of through the less expensive federal supply system, the use of improper procedures to disburse money for the Imprest Fund,[12] a complaint about so-called "high priority" requisitions,[13] the use of procedures in the ammunition area, a possible guard post violation, failure to use appropriate identification decals on Agency vehicles, the sale of Avon products by employees on government time, and a complaint about a security violation when a co-worker failed to "log off" a computer.[14] Lt. Col. Phillis, Captain Demcko

[8] Offices of Inspector General were created at most federal agencies in 1978 to, *inter alia*, "promote economy, efficiency and effectiveness in the administration of [agency programs and operations] and [ ] to prevent and detect fraud and abuse in such programs and operations . . ." 5 U.S.C.S. Appendix II, § 2; P.L. 95-452 (Oct. 12, 1978).

[9] App. at A-2.

[10] Id.

[11] App. at A-2.

[12] The Imprest Fund is a cash reserve used by the Agency to pay for supplies that are delivered by vendors on a "C.O.D." basis. App. at A-3.

[13] Clark's later removal was based, in part, on charges that she refused to sign for Imprest Funds, App. at A-18 to A-23, and to properly process high priority requisitions. App.at A-25 to A-28.

[14] App. at A-2, A-3, A-28 to A-29.

and Marsha Hanson, Clark's first-line supervisor, were aware of Clark's complaints to OIG.[15]

In August 1990, Clark was subject to a reduction-in-force ("RIF") and her position as a Computer Assistant was abolished. Clark was released from her competitive level and offered a position as a Supply Clerk, GS-5, SADA. Captain Demcko became her second-line supervisor.[16] In this new position, Clark was responsible for processing requisition forms for supplies, and was assigned duties as an Alternate Imprest Fund Cashier.[17]

Subsequent to the RIF, Clark filed a complaint with the Office of Special Counsel ("OSC").[18] OSC investigated Clark's complaint that her RIF was in retaliation for making protected disclosures, but elected not to prosecute the complaint.[19] Thereafter, Clark filed an appeal of her RIF with the Merit Systems Protection Board ("MSPB" or "Board").[20]

While the RIF appeal was pending, on June 17, 1991, Captain Demcko proposed to remove Clark from the federal service. Captain Demcko charged that in March 1991 Clark had refused to follow an order to sign a receipt for Imprest Funds and that in April and May 1991 she had defied authority by processing requisitions for supplies through the federal supply system instead of purchasing the items through local sources.[21]

The MSPB dismissed Clark's RIF appeal, without prejudice, pending a resolution of the proposed removal. Clark

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[15] Id.

[16] App. at A-2, A-17, A-19, A-32 to A-33.

[17] App. at A-2 to A-3.

[18] The Office of Special Counsel to the Merit Systems Protection Board was created by Reorganization Plan No. 2 of 1978, and became a part of the Civil Service Reform Act of 1978, P.L. 95-454 (Oct. 13, 1978). See, 5 U.S.C.S §§ 1204-1208 (1988). The Office was established to investigate and prosecute cases involving "prohibited personnel practices," including cases of so-called "whistleblowing." See, 5 U.S.C.S. §1206 (1988).

[19] App. at A-3.

[20] See, 5 U.S.C.S. § 1221 (Supp. I 1989).

[21] App. at A-3 to A-4.

was removed from the federal service in July 1991. She timely refiled her RIF appeal, as well as an appeal of her removal, with the MSPB. The two cases were consolidated for hearing.[22]

On January 17, 1992, an MSPB Administrative Judge issued an initial decision in the appeals affirming both the RIF and the removal.[23] The Administrative Judge found the RIF had been conducted for legitimate reasons, i.e., a shortage of funds that required the elimination of positions at SADA.[24] He further found that the Agency had proved, by a preponderance of the evidence,[25] that Clark had failed to sign for the Imprest Funds as charged, and that she had defied authority by ordering supplies through the federal supply system, instead of through local sources.[26]

In reviewing Clark's allegations that her RIF and removal were in retaliation for making protected disclosures, the Administrative Judge declined to issue a finding on whether Clark's complaints were protected disclosures under 5 U.S.C.S. § 2302(b)(8). The Administrative Judge found it unnecessary to issue a finding on whether the complaints were protected disclosures because he determined "that [Clark] has not shown that any of the disclosures contributed toward the agency decision to remove her."[27] The Administrative Judge issued a similar finding with respect to the RIF.[28]

In analyzing whether Clark's complaints were a contributing factor to her removal, the Administrative Judge wrote:

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[22] App. at A-4 to A-5.

[23] App. at A-17 to A-36.

[24] App. at A-33. As the Administrative Judge correctly noted, Clark did not challenge the **bona fides** of the RIF action as a whole. Rather, she maintained that her particular position had been abolished in retaliation for making protected disclosures. Id.

[25] See, 5 U.S.C.S. § 7701(c)(1)(B).

[26] App. at A-20, A-24, A-28.

[27] App. at A-30.

[28] App. at A-32 to A-34.

> Captain Demcko proposed [Clark's] removal and credibly denied that [her] disclosures influenced his action (Tr. 97). Colonel Phillis also credibly denied that any of [Clark's] complaints contributed toward the decision to remove her (Tr. 161, 162). Colonel Phillis observed in his testimony that none of [Clark's] complaints resulted in the imposition of disciplinary action against any employee (Tr. 160, 161).
>
> I find that most of [Clark's] long list of complaints are directed against her co-workers. None of the complaints allege intentional wrongdoing, abuse of authority, or gross mismanagement by either Captain Demcko or Colonel Phillis. The fact that [Clark's] disclosures were not personally directed against either individual renders it less likely that they instituted this removal action due to the disclosures. Moreover, record evidence does not show that either individual expressed irritation or a desire to retaliate against [Clark] based on the filing of the complaints. Finally, the propriety of the removal action itself is amply supported in this record. Management was simply confronted by an employee who refused to perform her duties and who has a documented history of defying supervisory authority. Faced with such an employee, it is difficult to find fault with the agency's removal action. I therefore find that [Clark] has shown nothing more than a propensity to file complaints and that she has not established by preponderant evidence that whistleblowing disclosures contributed to the agency's decision to remove her.[29]

The Administrative Judge entered similar findings with respect to the RIF.[30]

Clark filed a timely appeal with the U.S. Court of Appeals for the Federal Circuit. On appeal, Clark maintained that the

[29] App. at A-30.

[30] App. at A-32 to A-34.

Administrative Judge erred in not making a determination as to whether or not her disclosures were protected under 5 U.S.C.S. § 2302(b)(8); that the Administrative Judge applied an improper burden of proof in analyzing whether Clark's complaints were a contributing factor to her removal and RIF; and that the Administrative Judge applied an improper burden of proof to evidence offered by the Agency to demonstrate that the disclosures were not a contributing factor to her removal and RIF.[31]

The Court of Appeals acknowledged that Clark had raised three issues of "first impression" under the WPA.[32] The Court quickly dispensed with the first issue holding that it is not legal error to "assume for purposes of analysis" that an employee has established that she made protected disclosures and proceed to determine whether the disclosures were a contributing factor to the contested personnel action.[33]

Next, the Court rejected Clark's contention that, under the WPA, the Administrative Judge was required to analyze whether the Agency's deciding officials had actual or constructive knowledge of the protected disclosures when imposing the personnel action and whether the actions occurred within such a period of time that a reasonable person could conclude that the disclosures were a contributing factor to the action. Prior decisions of the MSPB and the legislative history of the WPA notwithstanding, the Court held:

> Thus, an AJ need not undertake an analysis of knowledge and timing in every case raising a whistleblower defense. This is not to say that an AJ can never consider the timing of a personnel action relative to knowledge of a whistleblowing disclosure. There may be cases in which the time is a factor supporting a conclusion that whistleblowing was a contributing factor. As with any other piece of cir-

[31] Clark also maintained the decision was not supported by substantial evidence, but does not raise that argument in this petition.

[32] App. at A-8.

[33] App. at A-9 to A-10.

> cumstantial evidence, this is simply one more factor for the trier of fact to consider. . . .[34]

Finally, the Court held that it was proper for the Administrative Judge to consider the propriety of the personnel action in determining whether or not Clark had shown that protected disclosures were a contributing factor to her removal and RIF. The Court rejected Clark's contention that such evidence must be evaluated in light of the clear and convincing evidentiary standard to demonstrate that the Agency would have taken the same action even absent the protected disclosures. The Court found:

> The argument is that any evidence relating to the reason for the agency's action must rise to the level of 'clear and convincing' evidence, rather than a preponderance of evidence, and that this is true whether the evidence is introduced for the purpose of establishing step two (was the disclosure a contributing factor) or step three (would the agency have taken the same action absent the disclosure). The argument confuses the weight given to a particular piece of evidence with the burden of proof a party bears on a particular issue.
>
> —
>
> Step two is for Clark to prove by a preponderance of the evidence. The agency may introduce any relevant and competent evidence to counter Clark's evidence, including the reason it acted. The AJ decides on the basis of all the evidence whether Clark proved her claim by a preponderance of the evidence.
>
> Step three-the agency's affirmative defense—must be proven by the agency by clear and convincing evidence. Again, the AJ, after considering all relevant and competent evidence introduced by both sides, decides whether

[34] App. at A-13.

> the agency has proven its claim, this time applying the 'clear and convincing' standard. It is the overall burden of persuasion each side must carry with regard to its separate issue that is the subject of the different standards of proof, not the weight of any specific factual evidence placed upon the scale. . . .[35]

Clark sought timely review by petition for certiorari in this Court.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Departed From Accepted Practice By Not Granting Deference To Merit System Protection Board's Interpretation Of The Statute It Is Charged With Enforcing

This case involves important issues of first impression under the Whistleblower Protection Act of 1989. The WPA is a "good-government statute" designed to foster the policy of "encourag[ing] government personnel to blow the whistle on wasteful, corrupt or illegal government practices without fearing retaliatory action by their supervisors or those harmed by the disclosures." *Marano* v. *Department of Justice*, -- F.2d. --, 1993 WL 290043, *4 (Fed. Cir. 1993). The legislation makes it "clear that Congress viewed the appellant's burden of showing retaliation as too stringent under previous law and the agency's burden of rebuttal as too low. . . ." *McDaid* v. *Department of Housing and Urban Development*, 46 M.S.P.R. 416, 420 (1990). What Congress made clear to the Merit Systems Protection Board apparently was less than clear to the Court of Appeals in this case. In rejecting the views of the MSPB regarding the burdens of proof in a whistleblower retaliation case, the Court of Appeals substantially departed from standard judicial practice by not according any

[35] App. at A-14.

deference whatsoever to the Board's interpretation of the statute it is charged with enforcing. Moreover, the Court rejected the "clear" views of Congress on reducing the burden of proof placed upon whistleblowers.

Whistleblower protection in the federal government had its genesis in President Carter's Reorganization Plan No. 2 of 1978. See, 5 U.S.C.S. § 903 notes; 43 Fed.Reg. 36037 (May 23, 1978). Under the Plan, President Carter proposed a widespread reform of the civil service, including the first statutory protection for so-called whistleblowers.

The Plan called for the abolition of the Civil Service Commission and a division of its personnel management and adjudicatory functions among two new agencies — the Office of Personnel Management and the Merit Systems Protection Board. See, Reorganization Plan No. 2, §§ 101-202. The Plan also created a Special Counsel to the Merit Systems Protection Board to investigate and prosecute allegations of so-called prohibited personnel practices, including retaliation for whistleblowing. Id. at §204. The Plan formed the basis for the Civil Service Reform Act of 1978 ("CSRA" or "Reform Act"), P.L. 95-454 (Oct. 13, 1978), as codified throughout Title 5 U.S.C.

Under the Reform Act, employees affected by lesser personnel actions, such as minor suspensions and reassignments, who believed the actions were based on retaliation for making protected disclosures, could bring such allegations to the Special Counsel. See, 5 U.S.C.S. §1205 (1980). The Special Counsel, in turn, was required to investigate those allegations and, where appropriate, seek corrective action on behalf of the employee and disciplinary action against offending management officials before the MSPB. There was, however, no right of administrative or judicial review of a Special Counsel decision not to prosecute an allegation of retaliation for whistleblowing. See, *Wren* v. *Merit Systems Protection Board*, 681 F.2d 867 (D.C. Cir. 1982).

Employees affected by more severe personnel actions, such as removal, suspensions in excess of 14 calendar days, and demotions, were given the right to appeal those actions

directly to the MSPB. 5 U.S.C.S. §§ 7512, 7513(d). The MSPB was required to sustain only those agency actions supported by a preponderance of the evidence. 5 U.S.C.S. § 7701(c)(1)(A). Notwithstanding the agency's proof, by a preponderance of the evidence, that the personnel action was justified, the MSPB was required to reverse any action which the employee demonstrated was based on a prohibited personnel practice, including retaliation for making protected disclosures. 5 U.S.C.S. §§ 7701(c)(2)(B), 2302(b).

In passing the Reform Act, Congress made no attempt to define the burdens of proof imposed on employees and agencies, respectively, in whistleblower cases. However, the MSPB and the courts began interpreting the Reform Act in such a way as to have "gutted the CSRA's protection of whistleblowers." *Marano* v. *Department of Justice*, ____ F.2d ____, 1993 WL 290043, *2 (Fed. Cir. 1993), *citing* 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. 1989); 135 Cong. Rec. 564 (1989) (remarks of Sen. Levin).

For example, in *Dunning* v. *National Aeronautics and Space Administration*, 718 F.2d 1170 (D.C. Cir. 1983), the Court held that to prevail on a whistleblower defense, an employee must show that (1) a protected disclosure was made; (2) the accused official had knowledge of the disclosure; (3) an adverse personnel action followed; and (4) there was a genuine nexus between the personnel action and the protected disclosure. See also, *Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281 (Fed. Cir. 1985); *Sullivan* v. *Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983).[36]

As the case law evolved, the Federal Circuit held the employee must show that "after a careful balancing of the intensity of [the agency's] motive against the gravity of the

[36] Initially, review of decisions of the MSPB was available in the court of appeals in the geographic circuit in which the case originated. See, 5 U.S.C.S. §7703(b) (1980). Through the Federal Courts Improvement Act of 1982, P.L. 97-164 (April 2, 1982), review of all MSPB cases was transferred to the U.S. Court of Appeals for the Federal Circuit.

misconduct, a nexus is established between the adverse action and the motive." *Stanek* v. *Department of Transportation*, 805 F.2d 1572, 1580 (Fed. Cir. 1986). The employee was required to prove that the reason for the adverse action was "predominantly retaliation. . . ." *Warren* v. *Department of Army*, 804 F.2d 654, 658 (Fed. Cir. 1986). Alternatively, this was phrased as requiring the employee to show that retaliation was a "substantial or motivating factor" in the adverse action. See, *Haine* v. *Department of the Navy*, 41 M.S.P.R. 462, 473 (1989).

Few were successful in meeting the burdens of proof established under the CSRA.[37] As a result, in 1988, Congress sought to ease the burden of proof placed upon "whistleblowers." S. 508, 100th Cong., 2d Sess. (1988). In passing S. 508, Congress specifically provided that:

> . . . the Board shall order corrective action . . . if the employee . . . has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action . . . The employee . . . may demonstrate that the disclosure was a factor in the personnel action by showing that-
>
> > (A) the official taking the personnel action knew of the disclosure; and
> >
> > (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.

S. 508, § 1221(3), 134 Cong. Rec. 19,988 (1988). Although

[37] Indeed, between its creation in 1982 and the passage of the WPA in 1989, the Federal Circuit did not reverse a single agency action due to reprisal for whistleblowing. Only a handful of employees were successful before the Board.

passed by the Congress, S. 508 was subsequently pocket vetoed by President Reagan in October 1988.

In January 1989, a slightly revised version of S. 508 was reintroduced into the First Session of the 101st Congress as S. 20. Section 1221(e)(1) of S. 20 read:

> . . . the Board shall order such corrective action . . . if the employee . . has demonstrated that a disclosure under section 2302(b)(8) was a factor in the personnel action. . . .

As enacted, 5 U.S.C.S. § 1221(e) reads precisely the same, except the word "contributing" was inserted before the word "factor."[38]

The MSPB is the administrative agency with primary jurisdiction for interpreting the provisions of the WPA. The Federal Circuit Court of Appeals, while it is the sole court responsible for reviewing MSPB decisions, still sits as an appellate court and not some super-executive agency with the authority to second-guess the Board. In the instant case, the Federal Circuit Court of Appeals has usurped the role of the MSPB as the primary interpreter of the WPA and has imposed its own view. It has done so not because the Board's interpretation is unreasonable, but only because it disagrees with the Board's interpretation and finds its own interpretation to be more reasonable. In so doing, the Court of Appeals has departed from accepted judicial practice and the precedent of this Court. See, e.g., *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 461 (1985).

The Federal Circuit itself has acknowledged that the actions of the MSPB are entitled to substantial deference in interpreting its own statutory authority. The Court should not substitute its judgment for that of the Board, unless the Board's interpretation is unreasonable or clearly unlawful.

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[38] As the Court noted in *Clark*, the word "contributing" was inserted at the request of the Administration as a clarifying measure. See, *Clark*, 997 F.2d at 1472 n. 5. (App. at A-12) 135 Cong. Rec. 4509 (1989) (statement of Mr. Levin).

Bennett v. *Department of the Navy*, 699 F.2d 1140 (Fed. Cir. 1983) (involving Board's interpretation of counsel fee provision of CSRA). See also, *Texas State Commission for the Blind* v. *United States*, 796 F.2d 400, 406 (Fed. Cir. 1986), quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) ("... authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with."); *Newman* v. *Teigeler*, 898 F.2d 1574, 1576 (Fed. Cir. 1990) ("'an agency's interpretation of the statutes it is charged with administering is normally entitled to great deference by a reviewing court.'"); *Baird* v. *Sonnek*, 944 F.2d 890, 894 (1991) ("[i]n the absence of compelling indications of error in an agency's implementing regulations, this court defers to an agency's reasonable interpretation of a statute...").

In the instant case, the Federal Circuit Court of Appeals flatly rejected the MSPB's interpretation of the statute it is charged with administering. On all three issues on which the Court issued rulings in this case, it overturned previous rulings of the MSPB in interpreting the WPA.

First, the Court overruled the finding of the MSPB in *Braga* v. *Department of the Army*, 54 M.S.P.R. 392, 397 (1992) that its administrative judges must issue findings on whether or not the disclosures made by an employee are protected under 5 U.S.C.S. § 2302(b)(8). See also, *Hebert* v. *Department of the Navy*, 57 M.S.P.R. 68, 75-76 (1993). In *Braga*, as in *Clark*, the Board's administrative judge proceeded to make a finding that the employee's disclosures were not a contributing factor to his removal without making findings on whether or not the disclosures were protected. The Board overruled the determination of its administrative judge finding that the officials taking the action had knowledge of the disclosure and the removal action "was taken within such a period of time after these...disclosures that a reasonable person could conclude that one or more of the disclosures was a contributing factor in the removal action." *Id.* at 398. The Board found that a remand of the case was in order because the determination

as to whether or not the employee had a reasonable belief that his disclosures evidenced a substantial and specific danger to the public health and safety "may depend on credibility determinations which should be made by the administrative judge." *Id.*

The Court of Appeals rejected the Board's holding in *Braga* finding that "[t]here is no reason why an administrative judge may not assume for the purposes of analysis that a petitioner has established the first step, and address the second step." *Clark*, 997 F.2d at 1470.[39] The Court went on to note "[o]f course, he [the administrative judge] runs the risk of having to evaluate step one on remand, as in *Braga*, should the MSPB determine that his finding on step two was in error." *Id.*

The Board has the authority to assign administrative judges to hear cases. 5 U.S.C.S. §§ 1205(g), 7701(b). It also has the right to prescribe regulations for the processing of appeals, 5 U.S.C.S. §§ 1205(h), 7701(a),[40] as well as the authority to prescribe regulations to carry out the purpose of section 7701. See, 5 U.S.C.S. § 7701(k). The Board is well within its authority to require that its administrative judges decide, in an orderly and expeditious manner, all issues presented by a case. Far from the Court's conclusion that such a procedure is "unnecessary, and probably wasteful," *Clark*, 997 F.2d at 1470,[41] the Board has concluded that such a procedure avoids unnecessary and wasteful remands and permits it to fully adjudicate cases on review without further processing by the administrative judge. See also, *Nafus* v. *Department of the Army*, 57 M.S.P.R. 386, 397-399 (1993). The mere fact that the Court of Appeals disagrees with the Board on the best way to process cases is not sufficient grounds for the Court to set aside a holding of the Board.

The Administrative Judge in this case amply demonstrated another reason why the Board has required its administrative

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[39] App. at A-9.

[40] Obviously, the MSPB also may interpret its own regulations through the adjudication of cases.

[41] App. at A-9.

judges to determine whether the disputed disclosures were protected prior to analyzing whether the disclosures were a contributing factor to the personnel action. The Administrative Judge opined that it was "unlikely" that any of Clark's disclosures constituted whistleblowing. He later found that Clark had "shown nothing more" than a propensity to file complaints. . . ."[42] But, if the complaints were protected, so was Clark's "propensity" to file them, and neither the Agency nor the Administrative Judge could hold that against her, as a matter of law. The Administrative Judge relied upon his view of Clark's complaints, irrespective of whether or not they were protected, to conclude that Lt. Col. Phillis and Capt. Demkco had no motive to retaliate because the complaints were not personally directed at them.

> In so doing, the administrative judge relied upon the evidence that the agency would use to show that it would have taken the action in the absence of the appellant's disclosure, to determine that the appellant did not show that retaliation was a contributing factor in the action at issue. This constitutes legal error, however, because if the appellant establishes that retaliation was a contributing factor, the agency's evidence must be analyzed under the "clear and convincing" evidence standard.

Caddell v. *Department of Justice*, 52 M.S.P.R. 529, 534 (1992), citing *Rychen* v. *Department of the Army*, 51 M.S.P.R. 179, 183-84 (1991).

Next, the Court overruled the MSPB's previous holdings that its administrative judges must conduct a "knowledge/timing analysis" in determining whether or not protected disclosures were a contributing factor to an adverse personnel action. In *McDaid* v. *Department of Housing and Urban Development*, 46 M.S.P.R. 416, 420-21 (1990), the MSPB explained its view of the burdens of proof under the WPA.

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[42] App. at A-30.

It is clear that Congress viewed the appellant's burden of showing retaliation as too stringent under previous law and the agency's burden of rebuttal as too low and it wished to redress this situation. As explained in the Senate Report,[43] "proving a causal connection between protected conduct and an agency's personnel action is difficult because direct evidence of retaliation is rare." S.Rep. No. 413 at 13. Referring to a recent court decision, *Warren* v. *Department of the Army*, 804 F.2d 654, 656-58 (Fed.Cir. 1986), the Senate noted that for an employee to prove a "nexus," the employee must show that the agency's motive was "predominantly retaliatory." The WPA would establish a "more reasonable standard" for proving a nexus by requiring proof only that retaliation was "a factor" in a personnel action, rather than a "significant" or "preponderant" factor. An employee would have to prove by "preponderant evidence" that retaliation was a factor. Id. at 13-14. *See also* 135 Cong.Rec. H747. Preponderant evidence is the degree of proof necessary to show that a contested fact is "more likely to be true than untrue." *See* 5 C.F.R. 1201.56(c)(2).

On the other hand, the agency's burden to show by clear and convincing evidence that retaliation was not a factor is a higher standard than preponderance of the evidence, the previous agency standard. *See* S.Rep. No. 413 at 15. This higher burden comes into play only if the employee has established by preponderant evidence that the whistleblowing was a contributing factor in the action, that is, that the agency's action was "tainted." *See* 135 Cong.Rec. H747. The heightened burden of proof required of the agency also recognizes that in proving the basis for an agency's decision, the agency controls "most

[43] S. Rep. No. 413, 100th Cong., 2d Sess., 135 Cong.Rec. H747 (March 21, 1989).

> of the cards," such as the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. *See id.*, H747. . . .
>
> One of the many possible ways to show by preponderant evidence that a protected disclosure is a contributing factor is to show that the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. S.Rep. No. 413 at 14.[3]
>
> > [3] "The Committee intends for the Board to use this reasonable time standard liberally because most reprisal cases are necessarily built on circumstantial, rather than direct, evidence." S.Rep. No. 413, 100th Cong., 2d Sess. 14 (1988). ". . .[S]uch decisions should be made on a case by case basis." *Id.*

The MSPB has consistently interpreted the WPA as a clear expression of congressional intent that an employee demonstrates that protected disclosures were a contributing factor in an adverse employment action when the employee demonstrates the official taking the action had actual or constructive knowledge of the disclosures and acted within such a period of time that reasonable persons *could* conclude that the disclosures were a factor in taking the action. See, *Gerrick* v. *General Services Administration*, 43 M.S.P.R. 651, 659-61 (1990); *Ruffin* v. *Department of the Army*, 48 M.S.P.R. 74, 78-79 (1991); *Rubert* v. *Department of the Navy*, 51 M.S.P.R. 467, 474 (1991); *Rychen* v. *Department of the Army*, 51 M.S.P.R. 179, 183 (1991); *Caddell* v. *Department of Justice*, 52 M.S.P.R. 529, 533 (1992) *on remand* 57 M.S.P.R. 508 (1993); *McClellan* v. *Department of Defense*, 53 M.S.P.R. 139, 146 (1992). See also, *Clark*, 997 F.2d at 1471. ("[i]n

practice, the Board has interpreted § 1221(e)(1) to incorporate a knowledge/timing test. . . .")[44]

As the MSPB explained in *Hebert* v. *Department of the Navy*, 57 M.S.P.R. at 75:

> . . . One of the many possible ways for an appellant to make the required showing is by establishing that the agency official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.
>
> The initial decision in the present case does not follow this analytical framework. Instead, the administrative judge simply concluded that appellant's disclosures were not a contributing factor in the agency's decision to withhold the "outstanding" performance rating because the agency established that it had legitimate management reasons for its actions. . . .
>
> Thus, the ground on which the administrative judge's findings are based does not relate to whether the agency had actual or constructive knowledge of the appellant's whistleblowing activities, or whether the agency's action was taken within such a period of time that a reasonable person could conclude that the appellant's disclosures played a part in the decision to deny the appellant his "outstanding" performance rating. Rather, the administrative judge, in determining that the appellant did not show that retaliation was a contributing factor in the action at issue, relied upon evidence the agency could have used to show that it would have taken the action in the absence of appellant's disclosure. This constitutes legal error because, if the appellant establishes that retaliation was a contributing factor, the agency's evi-

[44] App. at A-10.

> dence must be analyzed under the "clear and convincing evidence" standard. (citations omitted)

The MSPB has based its interpretation of the WPA on the statute itself and the burdens of proof set forth therein, and the legislative history. In *Clark*, the Federal Circuit has done nothing more than second-guess the Board on its interpretation of the statute it is charged with enforcing. But, that is not the role of the appellate court. In the first instance, the role of the Federal Circuit as an appellate court is to review the MSPB's interpretation of the statute and determine if it is reasonable. If so, then the Court must defer to that interpretation.

The Court also rejected the Board's previous holdings that its administrative judges may not consider the propriety of the personnel decision in determining whether protected disclosures are a contributing factor to the action, but must instead consider this evidence of propriety separately under the clear and convincing standard of proof. According to the Court, the Board's approach "confuses the weight given to a particular piece of evidence with the burden of proof a party bears on a particular issue." See, *Clark*, 997 F.2d at 1473.[45]

The MSPB has consistently found that it is legal error for its administrative judges to consider the propriety of the underlying personnel action in analyzing whether or not an employee has demonstrated that protected disclosures were a contributing factor to the action. See, *Braga* v. *Department of the Army*, 54 M.S.P.R. at 396-97; *Caddell* v. *Department of Justice*, 52 M.S.P.R. at 533-34, on remand, 57 M.S.P.R. at 514; *Rychen* v. *Department of the Army*, 51 M.S.P.R. at 183; *Hebert* v. *Department of the Navy*, 57 M.S.P.R. at 75. The MSPB has based its holdings on the precise wording of the statutes involved, as well as the legislative history of the WPA.

The original language of the CSRA provides that "notwith-

[45] App. at A-14.

standing" the fact that any agency has proven the propriety of the action by a preponderance of the evidence, the action shall not be sustained if it is based on any prohibited personnel practice described in 5 U.S.C.S. § 2302(b). 5 U.S.C.S. §§ 7701(c)(1)(B), 7701(c)(2). While keeping the original language of the CSRA intact under those sections, the WPA added language to the effect that the Board must order corrective action in any case where the employee demonstrates that a protected disclosure was a contributing factor to the action. 5 U.S.C.S. § 1221(e)(1). It also has made clear that such corrective action may not be ordered if the agency demonstrates "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C.S. § 1221(e)(2). This "heightened burden of proof required of the agency also recognizes that in proving the basis for an agency's decision, the agency controls 'most of the cards,' such as the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases." *McDaid* v. *Department of Housing and Urban Development*, 46 M.S.P.R. at 421.

As the Federal Circuit correctly acknowledged in *Clark*, there is a three step process for analyzing whistleblower retaliation cases. In the first step, the agency must prove, by a preponderance of the evidence, that it took the disputed personnel action for legitimate reasons. Assuming the agency meets its burden, in the second step, the employee must show, by a preponderance of the evidence, that his or her protected disclosure was a contributing factor in the personnel action. Assuming the employee meets his or her burden, in the third step, the agency must prove, by clear and convincing evidence, that it would have taken the same action even absent the protected disclosure. Congress has made clear that step two is to be determined "notwithstanding" the agency's proof under step one. 5 U.S.C.S. §§ 2302(b), 7701(c)(2)(B). In *Clark*, by holding that the finder of fact must evaluate all of

the evidence in step two, including the evidence used by the agency to meet its burden in step one, the Federal Circuit has not only overruled the MSPB; it has ignored the intent of Congress as expressed in the plain language of the statute. At the same time, it also has negated the WPA's provision that an agency must show it would have taken the same action, even in the absence of a protected disclosure, by clear and convincing evidence. In *Clark*, the Federal Circuit has virtually assured that no employee will ever prevail on a whistleblowing defense by holding that an agency's demonstration, by a preponderance of the evidence, that it took the personnel action for legitimate reasons rebuts any demonstration by the employee that a protected disclosure was a contributing factor to the personnel action.

The "gutting" by courts of the whistleblower protections brought about by the CSRA, *Marano* v. *Department of Justice*, — F.2d —, 1993 WL 290043, *2, is now occurring under the WPA-the very piece of legislation that was meant to reverse that trend. The Federal Circuit erred in not granting deference to the statutory interpretation of the MSPB, which was not only reasonable on its face, but, in the final analysis, far more reasonable than the interpretation adopted by the Court in *Clark*.

The Federal Circuit Is In Conflict With Itself

A traditional basis for review in this Court is to resolve a conflict in the circuit courts of appeals. Supreme Court Rule 10.1(a). Due to the consolidation of review of all MSPB decisions in the Federal Circuit, there can no longer be a split of the circuits in the traditional sense. However, two separate panels of the Federal Circuit, through their decisions in *Clark* v. *Department of the Army* and *Marano* v. *Department of Justice*, have now issued decisions which are irreconcilable. Thus, the jurisdiction of this Court is properly invoked to resolve the division within the Federal Circuit Court of Appeals.

In *Clark*, the Federal Circuit rejected the Board's interpretation of the WPA on the basis that the Board had relied, in part, on the legislative history of the WPA as enacted by the 100th Congress, 2d Session, which was later pocket vetoed by President Reagan. The Court specifically found that the Board's reliance on the previous legislative history was "misplaced." *Clark* v. *Department of the Army*, 997 F.2d at 1472.[46]

In *Marano*, a different panel of the Federal Circuit, specifically held it must interpret the WPA "in conjunction with the exhaustive legislative history of S. 508, 100th Cong., 2d Sess." *Marano* v. *Department of Justice*, — F.2d —, 1993 WL 290043, *3. In holding that an employee is not required to show a retaliatory motive on the part of the officials taking the personnel action, the *Marano* Court wrote:

> The policy goal behind the WPA was to encourage government personnel to blow the whistle on wasteful, corrupt or illegal government practices without fearing retaliatory action by their supervisors or those harmed by the disclosures. WPA 2, 103 Stat. 15, 5 U.S.C. 1201 note. Such encouragement is guaranteed by the substantially reduced burden that must be carried by the whistleblower to earn the WPA's protection from adverse action. So long as the protected disclosure is a contributing factor to the contested personnel action, and the agency cannot prove its affirmative defense, no harm can come to the whistleblower. We thus view the WPA as a good-government statute. As long as employees fear being subjected to adverse actions for having disclosed improper governmental practices, an obvious disincentive exists to discourage such disclosures. A principal office of the WPA is to eliminate that disincentive and freely encourage employees to disclose that which is wrong with our government. How a protected disclosure

[46] App. at A-12.

> is made, or by whom, matters not to the achievement of the WPA's goal. The elements of misgovernment must be disclosed before they can be cured in satisfaction of the WPA's raison d'etre.
>
> A typical case under the WPA involves an employee blowing the whistle on certain practices observed in the workplace, such as misuse of government funds or grossly wasteful practices. Since rectifying such conduct would not normally involve taking a personnel action against the whistleblower, any proximate personnel action taken against the employee would immediately demand attention as a potential violation of the employee's rights under the WPA. See 135 Cong. Rec. 5035 (1989) (reprint of Joint Explanatory Statement on S. 508) ("One of the many possible ways to show that the whistleblowing was a [contributing] factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosures and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."); 134 Cong. Rec. 27,854 (1988) (Joint Explanatory Statement on S. 508); see also *Clark*, slip op. at 12-15.

— F.2d at —, 1993 WL 290043, *4-5. (footnotes omitted) Curiously, the panel in *Marano* found no anomaly in its reliance upon the very legislative history that *Clark* had rejected.

Where the *Clark* panel rejected any timing/knowledge analysis, 997 F.2d at 1472[47], the *Marano* panel found that the "uncontested sequence of events," standing alone, was sufficient to demonstrate that the disclosure was a contributing factor to the personnel action. — F.2d at —, 1993 WL 290043, *6. Where the *Clark* panel rejected the notion that the agency's "legitimate" proffered reason for its action must

[47] App. at A-12 to A-13.

be evaluated under the clear and convincing standard, 997 F.2d at 1473[48], the *Marano* panel remanded the case for consideration of the agency's reason under the clear and convincing standard. — F.2d at —, 1993 WL, 290043, *6

While the *Clark* panel seeks to restrict the scope of the protections granted by the WPA and return to the **status quo** of the CSRA, the *Marano* panel reads the WPA expansively seeking to effectuate the "good-government" policies behind the statute. The two readings of the statute simply cannot be reconciled and this Court should grant certiorari to resolve the conflict within the Federal Circuit.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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[48] App. at A-14.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 92-3296

JANET M. CLARK,
PETITIONER,

v.

DEPARTMENT OF THE ARMY,
RESPONDENT.

DECIDED: July 1, 1993

Before NEWMAN, PLAGER, and LOURIE, *Circuit Judges.*

PLAGER, *Circuit Judge.*

This case raises several previously unsettled issues regarding the claim of retaliation for whistleblowing. Janet Clark, the petitioner, appeals a decision of the Merit Systems Protection Board (MSPB or Board) that upheld two Department of the Army (Army) actions: demoting her through reduction-in-force procedures, and removing her for failure to follow instructions and delay in carrying out instructions. *Clark* v. *Department of Army*, Nos. CH-0752-91-0717-I-1 and CH-0351-91-0797-I-1 (MSPB Jan. 17, 1992). Although Clark alleged that these actions were taken in reprisal for whistleblowing disclosures, the Board determined otherwise, on the basis that Clark's disclosures were not a contributing factor in the personnel actions. We affirm.

Background and Procedural History

At the time of her removal, Clark had been employed by the Department of the Army (Army) for approximately twenty-six years. In 1986, while she was a Production Controller, GS-8, at Savanna Army Depot Activity (SADA), she complained to the Army's Office of Inspector General (OIG) about misuse of government telephones, drinking on the job, and mismanagement of time and materials.

Shortly after Clark's reassignment to the position of Computer Assistant, GS-8, there was a change in command at SADA. In July 1989 Lt. Col. John Phillis, Jr. became Commander at SADA, and in August 1989 Captain Michael Demcko became Chief of SADA's Mission Division and Clark's immediate supervisor. They were not affected by or involved in her previous complaints to OIG, but they may have been informed of them. In the fall of 1989, Clark reported the use of 'bootleg' computer software in government computers to Capt. Demcko and Lt. Col. Phillis.

In May 1990 SADA was directed to reduce its staffing level because of insufficient funding. In response, Capt. Demcko identified nine positions, including Clark's, that would be subject to a reduction-in-force (RIF). Clark was informed on August 6, 1990 that her position was being abolished. She was offered and she accepted the position of Supply Clerk (Typing), GS-5, in the Installation Supply Branch of SADA's Mission Division.

Clark's new duties included processing requisition forms for supplies. In September 1990 she reported to her supervisor, Marcia Hansen, and Capt. Demcko that special order safety shoes were being improperly ordered. In October 1990, Clark contacted OIG to complain that items such as safety shoes and prescription safety glasses were improperly ordered through a local source rather than the central federal supply system, that requisition forms were incorrectly coded and improperly authorized, that vendor payments were not processed

promptly, that Imprest Fund vouchers were completed improperly, that supply personnel had inadequate training, and that an employee was selling Avon products during work. Hansen and Capt. Demcko knew of Clark's reports to OIG.

On December 6, 1990 the Chief of Installation Support Division appointed Clark as an Alternate Imprest Fund Cashier. This position required Clark to maintain $3,000 in an account to provide Imprest Fund services when the primary cashier, Donna Stotler, was absent, and to maintain adequate additional funds to cover disbursements. In February 1991 Clark reported to her acting supervisor that a co-worker had violated computer security by failing to 'log off' her computer.

Meanwhile, Clark had filed a complaint with the Office of Special Counsel (OSC), alleging that the RIF abolishing her position was a reprisal for her whistleblowing. OSC informed Clark on February 6, 1991 that it had found no evidence to support her allegation, and that the timing of events made it unlikely that the RIF was a reprisal. (Clark's complaints to OIG in October 1990 did not occur until after the RIF decision was made in August 1990.)

On Friday, March 1, 1991, Stotler told Clark to sign an interim cash receipt for money from the Imprest Fund. Clark refused. Hansen then instructed Clark to sign for the funds. A heated discussion ensued, and Clark again refused to sign. On Monday, March 4, 1991, Hansen presented Clark with a memorandum that stated, in part:

> 2. This memorandum constitutes a direct order which orders you to sign for the cash allotment which is necessary for you to properly function and assume your responsibilities as the Alternate Imprest Fund Cashier. On 1 March 1991, you refused to perform this function.
> 3. Failure to follow this order will be considered insubordination and may be grounds for disciplinary action up to and including removal.

At Clark's request, Hansen called higher level officials to confirm that Clark was required to sign for receipt of the funds. Clark continued to refuse to sign for the money. On March 6, 1991 Hansen finally asked Capt. Demcko to order Clark to sign the receipt for the funds. When he ordered her to do so within fifteen minutes, Clark obeyed.

On April 5, 1991 she filed a complaint with OSC alleging that she had been threatened with disciplinary action, including possible removal, in reprisal for her whistleblowing disclosures to OIG. OSC declined to pursue the matter because the information she supplied indicated no connection between the threat and her disclosures; instead, it appeared that her supervisors had threatened her with disciplinary action in March because of her refusal to perform her duties.

Clark had been notified, through verbal instructions and by a January 16, 1991 memorandum, of the importance of expediting high priority 'Desert Storm' requisitions. Despite this, she continued to process high priority requisitions through the slower federal supply system. On April 8 and 10, 1991 and May 8, 1991 Clark altered the supply source on four high priority 'Desert Storm' requisition forms without authorization; she ordered the repair parts through the federal supply system rather than through the local vendors which were requested.

On June 17, 1991 Capt. Demcko proposed Clark's removal from federal service on the basis that her failure to sign for the Imprest Funds and her improper processing of specific purchase requisitions constituted a defiance of authority, failure to follow instructions, and delay in following instructions. Clark complained to OSC that her proposal removal was a reprisal for whistleblowing, and asked OSC to seek a stay of the action, but OSC declined to pursue the matter. After an oral and written reply, Lt. Col. Phillis removed Clark on July 30, 1991.

Prior to her July removal for cause, Clark had filed with the MSPB an appeal of the RIF removal, pursuant to the

Individual Right of Action (IRA) provisions of the Whistleblower Protection Act. 5 U.S.C. § 1221 (Supp. I 1989). On June 27, 1991 that appeal was dismissed by the MSPB without prejudice, pending resolution of the proposed removal for cause. After her removal in July 1991, Clark refiled her previous appeal of the RIF and appealed her removal for cause. The two appeals were consolidated.

On January 17, 1992 the MSPB Administrative Judge's (AJ) initial decision upheld the Army's actions. The AJ found that Clark had disobeyed orders to sign for imprest funds, and had disobeyed instructions to honor high priority requests to purchase supplies from local sources. The AJ found Clark's explanations for her behavior to be inconsistent and incredible, and concluded that the Army had sustained its removal charges against Clark.

The AJ then addressed Clark's allegations that the RIF and removal for cause were taken in reprisal for her whistleblowing disclosures. He expressed doubt that Clark's disclosures rose to the level of protected 'whistleblowing' under 5 U.S.C. § 2302(b)(8) (Supp. I 1989). However, he found it necessary to address that issue because he concluded that Clark had not proven that her disclosures were a contributing factor in the personnel actions. The AJ's initial decision became final on February 21, 1992 when neither party filed a petition for review with the Board. Clark then appealed here.

The Whistleblower Protection Act

Section 2302(b)(8) of Title 5 of the United States Code (Supp. I 1989) prohibits adverse personnel actions against federal government employees in reprisal for certain 'whistleblowing' activities.[1] Section 2302(b)(8) was originally enacted

[1] The provision reads:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority —

as part of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, § 101, 92 Stat. 1111, 1116 (1978) (codified at 5 U.S.C. § 2302(b)(8) (1988), prior to the 1989 amendment), which established "an extensive framework of merit principles and personnel procedures . . . [and] detailed a host of 'prohibited personnel practices,'" among them reprisal for whistleblowing. *Spruill* v. *Merit Sys. Protection Bd.*, 978 F.2d 679, 682 (Fed. Cir. 1992).

In response to reports that the system was ineffective, Congress strengthened the protection afforded by whistleblowers by enacting the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C.). "The WPA substantially changed the role of the [Office of Special Counsel], revised the substantive provisions of the whistleblower defense, and created a new route in whistleblowing cases for employees to take in appealing agency discipline — the Individual Right of Action (IRA)." *Spruill*, 978 F.2d at 682.

Previously, the whistleblower defense had required an employee to show by a preponderance of the evidence that "(1) a protected disclosure was made, (2) the accused official knew of the disclosure, (3) retaliation resulted, and (4) there was a genuine nexus between the retaliation and petitioner's removal." *Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281, 1284 (Fed. Cir. 1985). The fourth test, nexus, was a particularly difficult one to meet. The third test could be satisfied if agency officials with knowledge of the protected dis-

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(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of —

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences —

(i) a violation of any law, rule, or regulation, or —

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . .

5 U.S.C. § 2302(b)(8) (Supp. I 1989).

closure were in charge of advising or effectuating the personnel action. "[B]ut then a careful scrutiny of the intensity of their motive to retaliate is necessary under test (4) to be weighed with the gravity of the misconduct charged, or inadequacy of the performance of duties . . . if the evidence shows that the motive for invoking the misconduct or inadequate performance as a reason for discharge is predominantly retaliation, [that] mak[es] the asserted reasons pretextual and establish[es] the 'nexus.'" *Warren* v. *Department of Army*, 804 F.2d 654, 658 (Fed. Cir. 1986).

The WPA simplified the nexus standard for employees by providing that the employee need only show that the whistleblowing disclosure was "a contributing factor," rather than a significant or predominant factor. The Act also heightened the burden of proof for the agency's affirmative defense from preponderance of evidence to clear and convincing evidence. These new standards for the whistleblower defense are contained in 5 U.S.C. § 1221(e):

> (e)(1) . . . the Board shall order such corrective action as the Board considers appropriate if the employee . . . *has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action* which was taken or is to be taken against such employee. . . .
>
> (2) Corrective action under paragraph (1) *may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.*

5 U.S.C. §§ 1221(e)(1) & (2) (Supp. I 1989) (emphasis supplied); *see also* 5 C.F.R. § 1209.7 (reiterating these standards of proof for any case involving a personnel practice that is prohibited under 5 U.S.C. § 2302(b)(8)).

Discussion

Three legal questions have been presented, all of which are issues of first impression in this court: (1) is the determination whether the employee's disclosure is protected activity under 5 U.S.C. § 2302(b)(8) a prerequisite to the determination that the activity was not a contributing factor in the personnel decision; (2) does the statute incorporate a 'per se' rule that requires an analysis of whether the deciding officials had actual or constructive knowledge of the employee's disclosure, and whether the timing of the adverse action was such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action; and (3) when the agency offers evidence to prove that the disclosure was not a contributing factor (an issue evaluated under the preponderant evidence standard), and this evidence is also relevant to the agency's affirmative defense that the same action would have been taken absent the disclosure, must the agency meet the higher 'clear and convincing' evidence standard reserved for its affirmative defense? In addition, Clark contends that substantial evidence does not support the AJ's decision.

A.

There are three steps in a complete analysis of an employee's whistleblower defense to an adverse personnel action: First, is the employee's disclosure a protected 'whistleblowing' activity under 5 U.S.C. § 2302(b)(8)? Second, was the disclosure a contributong factor in the personnel action? *Id.* § 1221(e)(1). Third, can the agency prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure? *Id.* § 1221(e)(2).

Clark asserts that the AJ committed legal error when he failed to complete his analysis of the first step before proceeding with the second step. In effect, Clark argues that an AJ should always be required to make findings on the issue

of whether a disclosure is 'whistleblowing' under § 2302(b)(8). The Board appears to have agreed with this position in an earlier case: "The administrative judge's analysis of the appellant's prima facie case was further flawed in that she made no finding on whether the appellant proved by preponderant evidence that his disclosures came within the purview of 5 U.S.C. § 2302(b)(8)." *Braga* v. *Department of Army*, 54 M.S.P.R. 392, 397 (1992). In *Braga*, the Board reversed the AJ's finding that Braga failed to meet the second step, but was unable to dispose of the case because the AJ had made insufficient findings with regard to the first and third steps.

When we examine the statute, we find that it does not mandate any particular sequence of analysis. Clark has not pointed to any legislative history that would require it, nor do we find any such suggestion in our review of that history.

There is no reason why an administrative judge may not assume for purposes of analysis that a petitioner has established the first step, and address the second step first. If the AJ concludes that the petitioner does not have a whistleblower defense because of a failure of proof at the second step, then it is unnecessary, and probably wasteful, to require him also to address step one. Of course, he runs the risk of having to evaluate step one on remand, as in *Braga*, should the MSPB determine that his finding on step two was in error. Nevertheless, that decision is clearly within the discretion available to a judicial forum in organizing its work. *See, e.g., Kiewit/Tulsa-Houston* v. *United States*, 981 F.2d 531, 534 (Fed. Cir. 1992) (court need not resolve unnecessary issue), *Air Line Pilots Ass'n* v. *UAL Corp.*, 897 F.2d 1394, 1397 (7th Cir. 1990) (discussing various meanings of "mootness;" alternative unnecessary grounds for a decision are moot), *United States of Am.* v. *Henry*, 815 F.Supp. 325, 327 (D. Az. 1993) (court need not consider second prong of test because Henry failed to meet initial prong); *Oxford House, Inc.* v. *Township of Cherry Hill*, 799 F.Supp. 450, 463 n.27 (D.N.J. 1992) (if plaintiff has established likelihood of success under one

theory, court need not address alternative theories); 13A Charles A. Wright, Arthur K. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533 (2d ed. 1984). There was no error here.

B.

Clark next argues that the AJ committed legal error because he failed to determine whether the deciding officials had actual or constructive knowledge of the disclosures and whether they acted within such a time period that a reasonable person could conclude that the disclosures were a contributing factor in the personnel action. Clark contends that an AJ must always undertake this knowledge/timing analysis when making a determination whether an alleged whistleblowing disclosure was a contributing factor.

In practice, the Board has interpreted § 1221(e)(1) to incorporate a knowledge/timing test that allows a petitioner to prove that whistleblowing was a contributing factor by showing that "the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. S. Rep. No. 413[, 100th Cong., 2d Sess.] 14 [(1988)]." *McDaid* v. *Department of Hous. & Urban Dev.*, 46 M.S.P.R. 416, 421 (1990); *see also, e.g.*, *Caddell* v. *Department of Justice*, 52 M.S.P.R. 529, 533 (1992); *Rychen* v. *Department of Army*, 51 M.S.P.R. 179, 183 (1991).

There is no such knowledge/timing test in the statute, but the Board in *McDaid* relied on Senate Report No. 413, which states:

> [U]nder S. 508, one of the ways an employee or the Special Counsel would be able to establish a nexus would be by showing that the official taking the personnel action knew of the disclosure and that the personnel

> action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action. The Board already has the authority to consider the taking of a personnel action within a relatively short time after a disclosure is made as an indication of reprisal. The Committee intends for the Board to use this reasonable time standard liberally because most reprisal cases are necessarily built on such circumstantial, rather than direct, evidence.

S. Rep. No. 413, 100th Cong., 2d Sess. at 14 (1988). This report accompanied S. 508,[2] which explicitly provided for the knowledge/timing test discussed in the Senate report:

> (e)(1) . . . the Board shall order such corrective action . . . if the employee . . . has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action. . . . The employee . . . may demonstrate that the disclosure was a factor in the personnel action by showing that —
>
> (A) *the official taking the personnel action knew of the disclosure;* and
>
> (B) *the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.*

S. 508, § 1221(e)(1), 134 Cong. Rec. 19,988 (1988) (emphasis supplied). However, S. 508 was never enacted — it was pocket vetoed in October 1988 by President Reagan.[3]

S. 508 was reintroduced in January 1989 as S. 20,[4] which was the bill enacted as the WPA. But § 1221(e)(1) of S. 20 (and the WPA as passed) lacks the language of S. 508 which

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[2] S. 508, 100th Cong., 2d Sess. (1988).

[3] 135 Cong. Rec. 564 (1989) (statement of Mr. Levin).

[4] S. 20, 101st Cong., 1st Sess. (1989).

provided for the knowledge/timing test.[5] Thus, the discussion of knowledge and timing in S. Rep. No. 413 does not apply to the WPA, and cannot be used to read a 'per se' knowledge/timing test into the statute. *McDaid's* reliance on the Senate report is misplaced.

The joint explanatory statement which accompanied S. 508 also discussed the knowledge/timing test. 134 Cong. Rec. 27,854 (1988). *See, e.g., McClellan* v. *Department of Defense*, 53 M.S.P.R. 139, 146 (1992) (relying on joint explanatory statement regarding knowledge/timing test); *Rubert* v. *Department of Navy*, 51 M.S.P.R. 467, 474 (1991) (same). Although this statement was reintroduced during the discussion of S. 20 in the Congressional record,[6] the portion of the statement that discusses the knowledge/timing test does not apply to S. 20 for the same reasons that the discussion of knowledge/timing in S. Rep. No. 413 does not apply.

Under 5 U.S.C. § 1221(e)(1), the employee has the burden of demonstrating that his or her whistleblowing disclosure was a contributing factor. The statute contains no 'per se' rule that knowledge of the disclosure and timing of the personnel action automatically satisfies this burden of proof. In fact, such a 'per se' rule was proposed but was deleted before enactment. There can be no clearer manifestation of Congressional intent to avoid a mandatory knowledge/timing test. *Cf. Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17-18 (1981) (private remedies in addition to those explicitly provided by statute should not be implied, especially when there is clear Congressional intent to limit remedies to those

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[5] Subsections (A) and (B) of S. 508 are absent from section 1221(e)(1) of S. 20, which simply reads:

> (e)(1) . . . the Board shall order such corrective action . . . if the employee . . . has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action. . . .

Note that the WPA, as enacted, contains the term "contributing factor" rather than "factor." The term was clarified at the Administration's request. 135 Cong. Rec. 4509 (1989) (statement of Mr. Levin).

[6]. 135 Cong. Rec. 4513 (1989) (Senate); *id.* at 5035 (House).

provided); *VE Holding Corp.* v. *Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990), *cert. denied*, 111 S.Ct. 1315 (1991).

Thus, an AJ need not undertake an analysis of knowledge and timing in every case raising a whistleblower defense. This is not to say that an AJ can never consider the timing of a personnel action relative to knowledge of a whistleblowing disclosure. There may be cases in which the timing is a factor supporting a conclusion that whistleblowing was a contributing factor. As with any other piece of circumstantial evidence, this is simply one more factor for the trier of fact to consider. There was no error in the AJ's handling of this matter.

C.

Clark also argues that the AJ wrongly considered the propriety of the personnel decision when he concluded, under step two of the three-part analysis, that Clark had not proven her disclosures to be a contributing factor in the personnel actions. Because evidence regarding the propriety of the personnel decision would be presented in step three if the agency chooses to raise the affirmative defense that the action would have been taken absent the disclosure, Clark contends that it should be evaluated under the 'clear and convincing' evidence standard of that step, rather than the preponderant evidence standard of step two. Clark's position is supported by the Board's statement in another case:

> the administrative judge relied upon the evidence that the agency would use to show it would have taken the action in the absence of the appellant's disclosure, to determine that the appellant did not show that retaliation was a contributing factor in the action at issue. This constitutes legal error, however, because . . . the agency's evidence

> must be analyzed under the "clear and convinving" evidence standard.

Caddell, 52 M.S.P.R. at 534.

The argument is that any evidence relating to the reason for the agency's action must rise to the level of 'clear and convincing' evidence, rather than a preponderance of evidence, and that this is true whether the evidence is introduced for the purpose of establishing step two (was the disclosure a contributing factor) or step three (would the agency have taken the same action absent the disclosure). The argument confuses the weight given to a particular piece of evidence with the burden of proof a party bears on a particular issue.

Step two is for Clark to prove by a preponderance of evidence. The agency may introduce any relevant and competent evidence to counter Clark's evidence, including the reason it acted. The AJ decides on the basis of all the evidence whether Clark proved her claim by a preponderance of evidence.

Step three — the agency's affirmative defense — must be proven by the agency by clear and convincing evidence. Again, the AJ, after considering all relevant and competent evidence introduced by both sides, decides whether the agency has proven its claim, this time applying the 'clear and convincing' standard. It is the overall burden of persuasion each side must carry with regard to its separate issue that is the subject of the different standards of proof, not the weight of any specific factual evidence placed upon the scale. The AJ did not err.

D.

Since we find no legal error in the AJ's decision, we address Clark's contention that the decision is not supported by substantial evidence. Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Ahles* v. *Department of Justice*, 768

F.2d 327, 329 (Fed. Cir. 1985) (quoting *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971)). The AJ found it unlikely that Clark's complaints contributed to the RIF, because almost all occurred after the RIF action was taken, or long before Capt. Demcko and Lt. Col. Phillis had assumed their positions at SADA. The AJ further found that Capt. Demcko and Lt. Col. Phillis "credibly denied" that any of Clark's complaints contributed to the removal decision. None of Clark's complaints was personally directed against these officials, and none alleged intentional wrongdoing, abuse of authority, or gross mismanagement on their part. There was no evidence that either individual expressed irritation or a desire to retaliate against Clark.

Clark specifically challenges the AJ's finding that Capt. Demcko and Lt. Col. Phillis credibly denied that Clark's disclosures had influenced their actions. However, such credibility determinations are "virtually unreviewable." *Hambsch* v. *Department of Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986). Clark merely points to testimony suggesting that these officials were unhappy that Clark made her complaints directly to OIG, rather than going through the chain of command. We find nothing in the record that would justify reconsidering the credibility determination of the initial fact-finder.

Clark also argues that the AJ should not have relied on the lack of a motive to retaliate. Clark asserts that since there is seldom direct evidence of intent to retaliate, *McDaid*, 46 M.S.P.R. at 420 (citing S. Rep. No. 413 at 14), the AJ cannot rely on the absence of such evidence to support a conclusion that the disclosures were not a contributing factor. But the opposite is equally true — the very absence of evidence to support Clark's case cannot be said thereby in some way to support Clark's case.

In *McDaid*, the MSPB found no motive to retaliate because the timing of the personnel action was almost two years after the disclosure, and McDaid's supervisor was not embarrassed by or concerned over the audit instigated by McDaid's com-

plaint. Audits were routine, and McDaid had complained about a minor matter. Similarly, in this case, the AJ determined that Capt. Demcko and Lt. Col. Phillis were not troubled or irritated by Clark's complaints, and the complaints were about relatively minor matters, largely bureaucratic in nature. We find that there is substantial evidence in the record as a whole to support the AJ's decision.

This court must affirm a Board decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (1988).

Conclusion

Because the decision of the Board contained no legal error and was supported by substantial evidence, it is

Affirmed.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

Docket Nos. CH-0752-91-0717-I-1
CH-0351-91-0797-I-1

DATE: *January 17, 1992*

JANET M. CLARK,
APPELLANT,

v.

DEPARTMENT OF THE ARMY,
AGENCY.

Ernest C. Hadley, Esquire, Wareham, Massachusetts, for the appellant.
Danny R. Moye, Chambersburg, Pennsylvania, for the agency.

BEFORE

STEPHEN E. MANROSE
Administrative Judge

INITIAL DECISION

Introduction

The appellant filed timely appeals from actions demoting her on October 13, 1990 through reduction-in-force procedures from the position of Data Management Assistant, GS-08, to the position of Supply Clerk, GS-05, and thereafter removing her on July 30, 1991 based on her alleged misconduct while employed in the Supply Clerk position. The appellant's initial appeal to the Merit Systems Protection Board,

which was filed from the reduction-in-force action after the appellant first sought corrective relief from the Office of Special Counsel, was dismissed without prejudice on June 27, 1991 and later joined with the appellant's subsequent removal appeal. I held a hearing in the joined cases on November 13, December 18, and December 20, 1991.

The appeals fall within the Board's appellate jurisdiction. *See* 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d); 5 C.F.R. § 351.901 (1991). For the reasons stated below, both the removal and reduction-in-force actions are AFFIRMED.

Analysis and Findings

Merits of the Removal Action — The removal action charges the appellant with "defiance of authority" and with failure to follow instructions and delay in carrying out instructions. The supporting specification first cites the appellant's actions toward her immediate supervisor, Marcia Hanson, starting on March 1, 1991 and continuing through March 6, 1991, when the appellant allegedly acted in a disruptive and defiant manner by refusing Ms. Hanson's instructions that she assume her duties as the Alternate Imprest Fund Cashier.

On December 6, 1990, Arlen J. Dahlman, Chief, Installation Support Division, appointed the appellant as Alternate Imprest Fund Cashier (Agency Response File : Tab D, Enclosure 3). The standard operating procedure for this position required the appellant to maintain $3,000 in an account to provide imprest fund services on a continuous basis in the absence of the Primary Cashier and to "receipt" from the Primary Cashier and maintain in the same account adequate additional funds to cover disbursements (Agency Response File: Tab D, Enclosure 5). Ms. Hanson stated that both she and Donna Stotler, Imprest Officer, trained the appellant in her duties as Alternate Imprest Cashier (Tr. 198). Ms. Stotler testified that she provided specific instructions to the appellant on March 1, 1991 regarding the handling of the imprest

fund and that the appellant had no questions regarding this instruction (Tr. 294).

It is evident from a reading of the standard operating procedure, a copy of which was provided to the appellant, that the appellant needed to keep monies to perform her duties as Alternate Imprest Fund Cashier in the absence of Ms. Stotler. Ms. Stotler explained that the cash was needed to pay vendors as well as to provide various travel reimbursements (Tr. 294). Captain Michael Demcko, Chief of the Mission Division and the appellant's second-level supervisor, corroborated this testimony by noting that many commercial vendors delivered supplies on a COD basis and they would not complete their deliveries absent payment of cash from the imprest fund (Tr. 67, 68).

Ms. Stotler testified that the appellant refused to sign an interim cash receipt for the money that was to be given to her on March 1, 1991, saying that "I am not signing for any money" (Tr. 295). Ms. Stotler reported the appellant's refusal to Ms. Hanson, whereupon ~~Ms. Hanson~~ went to the appellant's desk and the appellant repeated, in a "determined" manner, her refusal to sign for any money. Ms. Stotler stated that she then left the office because a loud argument ensued and she "didn't want to hear any more argument" (Tr. 296).

Ms. Hanson stated that when she asked the appellant for her side of the story, the appellant told her that "she was not going to sign for it and that [Ms. Hanson] could not make her sign for the money." Ms. Hanson testified that the appellant refused her "directive" to sign for the money and that she stated her refusal two or three times (Tr. 200, 207). Ms. Faye Kent, Purchasing Agent, stated that she heard both Ms. Hanson's order to the appellant to sign for the money and the appellant's refusal to obey the order (Tr. 607, 620). Ms. Kent stated that she left the office following the appellant's refusal because "it was always a fight going on after such stuff like that" (Tr. 607).

Both the appellant and Ms. Hanson agreed that it was necessary for the appellant to sign for the funds in order that the appellant could perform her job as Alternate Imprest Fund Cashier (Tr. 225, 554). The appellant, however, provided inconsistent testimony regarding whether Ms. Hanson ordered her on March 1, 1991 to sign for the funds. She testified at one point that Ms. Hanson did, in fact, instruct her to sign for the funds on March 1, 1991 (Tr. 555) but at another point she denied that such a directive had been issued (Tr. 558, 559). She further testified that she was unable to recall her response to Ms. Hanson (Tr. 556, 557).

The undisputed record reflects that the appellant needed to sign for the money to perform her duties as Alternate Imprest Fund Cashier. The undisputed record further reflects that the appellant did not sign for the money on March 1, 1991. Ms. Hanson provided credible testimony that she ordered the appellant to sign for the funds on that day. Her testimony is corroborated by the testimony of Ms. Kent. The appellant provided inconsistent testimony regarding whether she was ordered on March 1, 1991 to sign for the money. The appellant's denial that she was directed to sign for the money on March 1, 1991 is contradicted by the testimony of two witnesses, is inherently improbable because it is more likely that she was ordered to sign for the money in view of the need for her to perform the duties of her position, and is rendered less credible by the appellant's own inconsistent statements regarding this matter. I therefore find that the appellant's denial is not credible and that she was in fact directed to sign for the money on March 1, 1991. *See Hillen* v. *Department of the Army*, 35 M.S.P.R. 453, 459-461 (1987).

The appellant's refusal to obey Ms. Hanson's March 1, 1991 directive to sign for the funds is supported by the testimony of Ms. Hanson, Ms. Stotler, and Ms. Kent. The appellant's vague recollection of her response to this order does not refute this evidence. Moreover, even if the appellant had not verbally responded to Ms. Hanson's directive, the undisputed

record reflects that she did not obey the directive because she did not sign for the money on March 1, 1991. The appellant's conduct was made more egregious because she repeatedly refused to sign for the money and she argued with her supervisor regarding the order. The disruption caused by the appellant's conduct is illustrated by the testimony and written statements of Ms. Kent (Agency Response File: Tab L) and Ms. Stotler (Agency Response File: Tab K) that they left the office to avoid the disruption and stress caused by the appellant's conduct.

The appellant's conduct on this day alone is supportive of the charge that the appellant was defiant of her supervisor's authority and that she failed to follow instructions. The record shows, however, that this pattern of conduct continued for several more days. Ms. Hanson testified that on the next workday, March 4, 1991, she gave the appellant a written order to sign for the imprest funds but that the appellant continued in her refusal to obey this order (Tr. 202). This written order notified the appellant that she must sign for the cash allotment and her refusal to sign would "be considered insubordination and may be grounds for disciplinary action up to and including removal" (Agency Response File: Tab N).

Chester Misner, President of Union Local R736, was present, at the request of Ms. Hanson, when the above written order was given to the appellant on March 4, although he stated that this meeting did not require the presence of a union official (Tr. 382, 383, 394). He testified that the appellant requested that another union representative attend the meeting, that the union representative requested by the appellant was unavailable at the time of the meeting, and that Ms. Hanson denied the appellant's request to delay the meeting (Tr. 383, 384). Ms. Misner also testified that the appellant then acknowledged in writing her receipt of Ms. Hanson's written order and left the room (Tr. 388).

The appellant admitted that she acknowledged receipt of the memorandum ordering her to sign a receipt for the money (Tr. 536). Both Ms. Hanson and the appellant agree that the appellant did not sign a receipt for the money on either March 4 or 5, 1991 even though both Ms. Hanson and the appellant were at work on both of those days (Tr. 236, 239, 537, 538). This record therefore shows that the appellant continued in her defiance of supervisory authority on those days by failing to obey the repeated directives issued to her both orally and in writing to sign for the money.

Ms. Hanson testified that on March 6, 1991 she rejected the appellant's request that she withdraw the written order directing the appellant to sign for the money, that she again told the appellant to sign for the money, and that the appellant again refused the order (Tr. 203, 204, 207). She stated that the appellant persisted in this refusal even after she attempted to placate the appellant by calling higher level agency officials to verify that in fact the appellant was required to sign for the money (Tr. 205, 206). The appellant testified that the order was "in limbo" because of these calls and that she therefore did not refuse to obey any order on March 6, 1991 (Tr. 541, 542).

I find, contrary to the appellant's apparent interpretation, that Ms. Hanson merely placed the calls in an unsuccessful attempt to secure the appellant's cooperation in signing for the money. Because Ms. Hanson did not withdraw either the verbal or written orders previously issued, the appellant continued in her defiance of supervisory authority by again refusing to sign for the money.

Apparently because Ms. Hanson then realized the appellant would simply not obey her orders under any circumstances, Ms. Hanson requested her supervisor, Captain Demcko, to direct the appellant to sign for the money. Captain Demcko testified that he then came into the work area and told the appellant she had fifteen minutes to sign for the money. He stated that the appellant then left the work area apparently

to go to the restroom but finally came back and signed for the money (Tr. 64). He stated that the appellant's refusal up to this time "created turmoil and hardship throughout the whole office" (Tr. 68). The appellant admitted that she obeyed Captain Demcko's order but that she shortly thereafter called the Office of Inspector General to complain about the matter, whereupon that office told her it "appeared that [she] was hung up on regulations" (Tr. 543, 544).

The appellant indicated in her testimony that she did not sign for the money at any earlier time because there were unresolved regulatory questions regarding her authority to sign for the money (Tr. 540). This explanation is meritless. It is well settled that an employee does not have unfettered discretion to disobey or ignore agency orders. The employee must obey the order, even if inappropriate, and then grieve it later, except in circumstances that would place her in a clearly dangerous situation. *See Thompson* v. *U.S. Postal Service*, 50 M.S.P.R. 41, 46 (1991); *Washington* v. *Department of Veterans Administration*, 49 M.S.P.R. 632, 638 (1991); *Nickerson* v. *U.S. Postal Service*, 49 M.S.P.R. 451, 459 (1991). Here, the order did not place the appellant in a clearly dangerous situation and furthermore the order was not inappropriate. Compliance with the order was in fact necessary if the appellant were to be able to perform the duties of her position.

I further find that the appellant was in fact aware of the principle that she must obey an order and grieve later. Chester Misner testified that he had previously notified the appellant "many times" that she must obey supervisory orders unless "it is unsafe physically" (Tr. 395). The appellant's denial that she was familiar with this concept (Tr. 568) is incredible. This appellant had been disciplined on three previous occasions in part for insubordination. She is very familiar with a wide variety of differant administrative complaint procedures as is evidenced by Mr. Misner's testimony regarding the "pretty thick" file that exists on the appellant's past grievances and com-

plaints (Tr. 391) and the appellant's own numerous references to her past grievances and complaints. It is inconceivable in view of this history of disciplinary actions for insubordination and her familiarity with administrative appeal procedures that she would have been ignorant of the concept that she must obey supervisory orders. Even assuming, for the sake of argument, that she was unfamiliar with the specific legal concept to obey then grieve, she does not, as discussed above, have unfettered discretion to disobey supervisory directives. *See also Bassett* v. *Department of the Navy*, 34 M.S.P.R. 66, 69 (1987) (agency employees are expected to respect authority and follow the orders of supervisory officials).

The record contains ample evidence of the appellant's defiance of supervisory authority. The appellant repeatedly refused to follow oral and written instructions from her supervisor and she did so in an argumentative and disruptive manner. An agency is entitled to have its employees respect supervisory authority and deport themselves in conformance with accepted standards. *See Fonville* v. *Department of Health and Human Services*, 30 M.S.P.R. 351, 351 (1986); *Roberson* v. *Veterans Administration*, 27 M.S.P.R. 489, 494 (1985). The Board has stated that "[o]ur decisions have emphasized that insubordinate, disruptive, and disrespectful behavior toward supervisors seriously undermines the capacity of management to maintain employee efficiency and discipline." *See Richard* v. *Department of the Air Force*, 43 M.S.P.R. 303, 308, *aff'd*, 918 F.2d 185 (Fed. Cir. 1990).

I find, in summary, that preponderant evidence supports both the charge of defiance of supervisory authority and the charge that the appellant failed to follow instructions and delayed carrying out instructions based upon the circumstances described above. I further find that these charges are based upon appropriate disciplinary cause. *Id.* at 308; *Bassett* v. *Department of the Navy*, 34 M.S.P.R. at 69.

In further support of the above charges, the agency cited the appellant's alleged actions in delaying the processing of

supply requisitions by changing, without authorization, the source of supply for repair parts. Specifically, the appellant allegedly improperly changed the source of supply for requisitions submitted by Larry Schafer, Mobile Equipment Mechanic Foreman, on April 8 and 10, 1991 and also for a requisition submitted by David Glasgow, Roads and Grounds Foreman, in May, 1991.

Ms. Hanson confirmed in her testimony that a part of the appellant's job required her to enter purchasing requisitions in the system for processing (Tr. 209). Ms. Hanson stated that she instructed the appellant to honor a local source of purchase requested by a customer who ordered repair parts for the garage and that she provided this directive to the appellant when the appellant first began work in her position (Tr. 210). She stated that the appellant challenged this directive, even after she was referred to the pertinent portion of the regulation that permitted local purchase of repair parts (Tr. 210, 211). Ms. Hanson stated that she repeated this directive to the appellant on several other occasions before April, 1991 (Tr. 217). She further stated that the appellant did not have authority to alter the suggested source of the purchase without going back to the customer (Tr. 217). She stated that notwithstanding these instructions the appellant altered the suggested supply source as charged in the specifications of misconduct by improperly ordering repair parts through the federal supply system, which resulted in a delay in securing the parts, rather than through the suggested local supply source without checking back with the customers (Tr. 211-216, 257; Agency Response File: Tabs G, H, I).

Connie Knop, Purchasing Agent, testified that she was responsible for actually making the local purchases that were ordered through the requisitions initially processed by the Supply Clerk (Tr. 271). She stated that before the appellant took over as Supply Clerk, she was "very busy" but that after the appellant started work her workload "dwindled" to the point that she was "out of work" (Tr. 272). She corroborated

Ms. Hanson's testimony regarding the appellant's failure to properly process the requisitions at issue so that the purchases would be made through the suggested local sources and that as a result of this failure it was necessary for duplicate requisitions to be submitted by the customers (Tr. 276-278).

Captain Demcko testified that after the appellant began working as a Supply Clerk in September, 1991, it came to his attention that the requisitions submitted by her customers were beginning to become backlogged. He therefore issued her a written directive on October 18, 1990 to process the requisitions as expeditiously as possible (Agency Prehearing Exhibit 2; Tr. 74). He subsequently issued another memorandum dated January 16, 1991 which stressed the necessity of expediting high priority "Desert Storm" requisitions (Agency Prehearing Exhibit 3). He stated that the appellant violated this directive by not processing high priority "Desert Storm" requisitions, including those at issue in these charges, through local purchase but rather that she continued instead to process those requisitions through the much slower federal supply system (Tr. 76-91). He stated that the appellant's refusal to follow his directives contributed to a delay in getting vehicles off a non-operational status and that this mission (getting vehicles in an operational status) was "absolutely critical" (Tr. 96).

The appellant did not contest the agency evidence showing that she ordered the referenced repair parts through the federal supply system rather than through local purchase. She testified, however, that she obeyed the directive of Ms. Hanson that unless the requisition was hand-carried to her, she was to order the part through the federal supply system (Tr. 574).

This explanation lacks credibility for several reasons. In the first place, the appellant testified that she was not even aware if the requisitions were hand-carried to her office (Tr. 589). Absent such knowledge, she could not discriminate between requisitions on the basis of whether or not they were hand-

carried. Secondly, both Captain Demcko and Ms. Hanson provided evidence rebutting the appellant's assertion that she was to process the requisitions at issue through the federal supply system. Their testimony and documentary submissions show that instead the appellant was repeatedly directed to process the requisitions for local purchase. This evidence is corroborated by Ms. Knop who testified that she believed that the appellant was aware of complaints that she was not processing items for local purchase (Tr. 276). Ms. Knop attributed the appellant's failure in this regard to her "unwillingness to do her job" (Agency Response File: Tab J). I further find it likely that the appellant was made aware of an April 23, 1991 written complaint from Lawrence Schafer who, in an apparent reference to the appellant, stated that her "incompetence and belligerence" was resulting in an unwarranted delay in the ordering of parts (Agency Response File: Tab I). This complaint, made in advance of the appellant's improper processing of David Glasgow's requisition, should have again placed the appellant on notice of the problem at issue here.[1] The appellant herself indicated that Ms. Knop called this problem (need to process for local purchase) to her attention in April, 1991 (Tr. 587).

The appellant's assertion that she had to order the referenced requisitions through the federal supply system because she could not disobey the instructions provided to her by Ms. Hanson is both ironic and incredible because she blatantly and belligerently refused on another occasion to follow Ms. Hanson's instructions to sign for cash and act as Alternate Imprest Fund Cashier. I find instead that preponderant evidence shows that the appellant again intentionally refused to follow repeated supervisory instructions and that the above

[1] The appellant disingenuously testified that it was "fine" that the parts ordered by Mr. Glasgow were delayed because Mr. Glasgow came into her office, threw up his hands, and stated that he would have to wait "until June" before the parts came in. The appellant further disingenuously stated that "I don't know who he was irritated with" (Tr. 583).

circumstances are supportive of the charge that she failed to follow instructions and delayed carrying out instructions.

I find, in summary, that both charges are supported by preponderant evidence and that they state an appropriate basis for the imposition of disciplinary action to promote the efficiency of the service. I therefore find that both charges are sustained.

Allegation of Whistleblowing — The appellant alleges that the removal action was taken because she is a whistleblower. She must establish by preponderant evidence that a protected whistleblowing disclosure was a contributing factor in the removal action. *See* 5 C.F.R. § 1209.7(a) (1991).

This appellant has shown that she filed a large number of complaints, including many with the agency's Inspector General. A partial list of these complaints includes the following: a complaint to the Inspector General in 1986 that a named employee was using a government telephone to make personal long distance telephone calls (Tr. 439), that several named employees were drinking on the job (Tr. 440), and a general allegation that the Fabrication Branch did not account for materials or labor time (Tr. 440); complaints brought to the attention of Captain Demcko between October, 1989 and June, 1990 that employees were using "bootlegged software" in government computers (Tr. 456, 457); a complaint made to Colonel John Phillis, Jr., Commander of the Savanna Army Depot Activity, also between October, 1989 and June, 1990, concerning "[t]he use of software on the computers that had not been purchased by the Government" (Tr. 458); a complaint made to the agency's Inspector General in July, 1990 that "had to do with procedures in the ammunition area and also a possible violation with the guard post" (Tr. 464); another complaint made to the Inspector General at the same time that agency vehicles did not have appropriate decals and that employees were selling Avon products during working hours (Tr. 465, 466); a complaint made in September, 1990, to Ms. Hanson, Cap-

tain Demcko, and the agency's Inspector General that safety shoes were improperly ordered through a local source rather than through the federal supply system (Tr. 486, 487), a complaint also made to the Inspector General in October, 1990, that prescription safety glasses were improperly ordered through a local source rather than through the federal supply system (Tr. 515); a complaint in November, 1990, about high priority requisitions (Tr. 122); a complaint generated sometime in 1990 after the appellant saw an official government car at a local restaurant (Tr. 462); a complaint to the Inspector General that a named employee was selling T-shirts and caps and using a government vehicle to deliver these items (Tr. 544);[2] and a complaint made to acting supervisor Jan Bradshaw of the existence of a "security violation" (Donna Stotler did not log off her computer on one day in February, 1991) (Tr. 411, 412).

Colonel William Shirley, Inspector General for the Depot Systems Command, testified that he was in frequent contact with the appellant regarding her numerous complaints. He concluded that these complaints were "administrative type and procedural type complaints" and did not constitute allegations of "intentional fraud or abuse of authority or gross mismanagement or anything like that" (Tr. 354, 355). He testified that he attempted to encourage the appellant to bring these problems to the attention of her supervisors and "work them out rather than have the IG or someone else get involved in them" (Tr. 364).

"Whistleblowing" is defined as a disclosure of information that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of authority, or substantial and specific danger to public health or safety. 5 C.F.R. § 1209.4(b) (1991). In light of the

[2] The appellant admitted on cross-examination that she herself sold items for a friend on government property (Tr. 590). She defended this conduct by stating that she did not solicit the sales nor did she personally profit by the sales (Tr. 591, 592).

Inspector General's evaluation of the appellant's numerous complaints, it seems unlikely that the complaints constitute "whistleblowing" disclosures. I need not and do not find which, if any, of the disclosures are indeed whistleblowing disclosures, however, because I find that the appellant has not shown that any of the disclosures contributed toward the agency decision to remove her.

Captain Demcko proposed the appellant's removal and credibly denied that the appellant's disclosures influenced his action (Tr. 97). Colonel Phillis also credibly denied that any of the appellant's complaints contributed toward the decision to remove her (Tr. 161, 162). Colonel Phillis observed in his testimony that none of the appellant's complaints resulted in the imposition of disciplinary action against any agency employee (Tr. 160, 161).

I find that most of the appellant's long list of complaints are directed against her co-workers. None of the complaints allege intentional wrongdoing, abuse of authority, or gross mismanagement by either Captain Demcko or Colonel Phillis. The fact that the appellant's disclosures were not personally directed against either individual renders it less likely that they instituted this removal action due to the disclosures. Moreover, record evidence does not show that either individual expressed irritation or a desire to retaliate against the appellant based on the filing of the complaints. Finally, the propriety of the removal action itself is amply supported in this record. Management was simply confronted by an employee who refused to perform her duties and who has a documented history of defying supervisory authority. Faced with such an employee, it is difficult to find fault with the agency's removal decision. I therefore find that the appellant has shown nothing more than a propensity to file complaints and that she has not established by preponderant evidence that whistleblowing disclosures contributed toward the agency's decision to remove her.

Removal Penalty — The appellant has a long history of federal employment — approximately twenty-six years at the time of her removal. She has a past disciplinary record including an August, 13, 1987 reprimand for insubordination (Agency File: Tab U); a September, 1987 five-day suspension for absence without leave (AWOL) and insubordination (Tab T); and a seven-day suspension in June, 1989 for creating a disturbance in the workplace (Tabs R, S). The sustained current charges are very serious. *See Bassett* v. *Department of the Navy*, 34 M.S.P.R. at 69 ("the disobedience of proper orders by an employee is done at the risk of being insubordinate and may be sufficient cause for removal"). The Board has upheld removal penalties in similar cases. *See Richard* v. *Department of the Air Force*, 45 M.S.P.R. at 309 (current charges of insubordinate and disrespectful behavior and three prior disciplinary actions for the same type of behavior warranted removal, notwithstanding the employee's long history of federal employment); *Fonville* v. *Department of Health and Human Services*, 30 M.S.P.R. at 354, 355 (removal upheld based on three incidents of disrespectful, disruptive, and insubordinate behavior and two prior disciplinary actions, notwithstanding nineteen years of government service).

The appellant's conduct, as discussed above, was intentional and repeated. There are no mitigating circumstances that lessen the seriousness of her conduct. Although she understandably was upset because she was demoted in the reduction in force, that fact did not excuse her intentional and repeated defiance of supervisory authority and refusal to obey instructions. She has also shown no remorse for her actions nor does she appear to recognize the impropriety of her conduct. Accordingly, I find that Colonel Phillis reasonably stated in his decision removing the appellant that she has no rehabilitative potential. The appellant was repeatedly placed on notice of the impropriety of her actions and warned of the possibility of disciplinary action if she continued her course of conduct.

For example, she was specifically notified in the March 4, 1991 written order from Ms. Hanson of the possibility that she might be removed if she persisted in her insubordinate conduct.

The Board does not substitute its judgment for that of the agency regarding the appropriateness of the disciplinary penalty administered except if it determines that the penalty is outside tolerable limits of reasonableness. *See Douglas* v. *Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). I find, after a consideration of all the above factors, that the agency reasonably determined that no alternative disciplinary sanction would be appropriate in this case. I therefore decline to mitigate the removal penalty.

Reduction in Force Appeal — Richard Paradise, Personnel officer, testified that the reduction in force was initiated when the Savannah Army Depot Activity received a directive from the Letterkenny Army Depot in Chambersburg, Pennsylvania, to reduce staffing levels from 215 positions down to 197 positions (Tr. 17). He stated that as a result of this higher command directive seventeen reduction-in-force notices were issued on or about August 9, 1990 (Tr. 19). At that time the appellant was employed in the position of Data Management Assistant, GS-08.[3] She was notified by letter dated August 6, 1990 of the reduction in force caused by insufficient funding to maintain the agency's staffing level (Agency Response File: Tab 4F).

Captain Demcko testified that he was directed to eliminate nine of the eighty-seven positions under his supervision and

[3] The appellant had formerly been employed as a Computer Assistant. In a belated response to an earlier complaint by the appellant that she needed a new position description, the agency provided her with a new job title and position description only a few days before the date that she was provided with notice of the reduction in force (Tr. 112, 113). The undisputed record establishes that the change in name of the appellant's position and new job description played no role in the reduction in force because the position remained by itself in its own competitive level (Tr. 38, 43).

that one of the positions he elected to abolish was the position incumbered by the appellant (Tr. 58). The appellant does not dispute the validity of the agency's reason for the reduction in force, she only contends that she was personally affected by the reduction in force in retaliation for her whistleblowing.

A shortage of funds constitutes a valid reason for the agency's reduction-in-force action. 5 C.F.R. § 351.201 (a)(2) (1991). The appellant does not dispute the validity of this reason, and I therefore find that preponderant evidence establishes that the reduction-in-force action was taken for a legitimate management reason. *See Losure* v. *Interstate Commerce Commission*, 2 M.S.P.R. 195, 202 (1980).

Because the appellant incumbered the only position within her competitive level (Tr. 43; Agency Response File: Tab 4i), she was necessarily reached for release from that level when her position was abolished. She does not claim any assignment right to any other position (Tr. 46; Appellant's Prehearing Submissions).

In cases such as this, where the agency undertakes a reduction in force for legitimate management reasons, the Board generally has no authority to review which positions the agency should have abolished. *See Griffin* v. *Department of Agriculture*, 2 M.S.P.R. 168, 171 (1980). Because this appellant contends that her position was abolished because she engaged in whistleblowing, however, I will review the basis for the agency's determination to abolish her position as a part of my review of this affirmative defense.

Captain Demcko testified that he selected the appellant's position for elimination and that Colonel Phillis could have, but did not, elect to override his recommendation (Tr. 58, 59). A legitimate management basis existed for abolishment of the appellant's position because the undisputed evidence reflects that there was very little work that could be performed in the position. Captain Demcko testified in that respect that as early as the fall of 1989 the appellant complained that she was running out of work (Tr. 108). The appellant confirmed in her

testimony that she was running out of work (Tr. 460). The new position description and job title assigned shortly before the reduction in force only constituted a redefinition of the same job (Tr. 30). The record therefore indicates that the appellant would still have had virtually no work to perform in the newly-defined job of Data Management Assistant. Because of the lack of work in the position, it is logical that the position was targeted for elimination in the reduction in force. This evidence lessens the possibility that the position was instead abolished because of any whistleblower disclosures generated by the appellant.

The fact that the alleged whistleblowing disclosures were not personally directed against Captain Demcko or Colonel Phillis and the absence of evidence showing that either individual expressed irritation or an inclination to retaliate against the appellant also lessens the possibility that the appellant's position was abolished in retaliation for her whistleblowing disclosures. In addition, the record reflects that many of the disclosures involved events that occurred before Colonel Phillis and Captain Demcko assumed their positions (in the summer of 1989) or after issuance of the reduction-in-force notice in August, 1990. The agency could not have identified the appellant's position for abolishment because of disclosures not yet made by the appellant. It is very unlikely; and the appellant has not shown, that either Captain Demcko or Colonel Phillis retaliated against her based on disclosures that concerned events which occurred before they even assumed their positions.

I find, for all the above reasons, that the appellant has not supported by preponderant evidence her allegation that her alleged whistleblowing disclosures contributed toward the agency's decision to abolish her position in the reduction in force. I therefore find, in summary, that the propriety of the reduction-in-force action is supported in its entirety by preponderant evidence. *See Losure* v. *Interstate Commerce Commission*, 2 M.S.P.R. at 202.

Decision

The agency's reduction-in-force and removal actions are AFFIRMED.

FOR THE BOARD: s/ STEPHEN E. MANROSE

STEPHEN E. MANROSE
Administrative Judge

Notice to Appellant

This initial decision will become final on *February 21, 1992*, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

Board Review

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

THE CLERK OF THE BOARD
MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

Judicial Review

If you are dissatisfied with the Board's final decision, you may file a petition with:

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

Notice to Agency/Intervenor

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX C

BRIEF FOR PETITIONER JANET M. CLARK

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

United States Court of Appeals
for the Federal Circuit

Received
May 26, 1992

92-3296

JANET M. CLARK,
PETITIONER,

v.

DEPARTMENT OF THE ARMY,
RESPONDENT.

PETITION FOR REVIEW OF DECISION OF
THE MERIT SYSTEMS PROTECTION BOARD

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Attorney for Petitioner

Dated: May 22, 1992

* * *

disclosures were not personally directed against either individual renders it less likely that they instituted this removal action due to the disclosures.

> Moreover, record evidence does not show that either individual expressed irritation or a desire to retaliate against the appellant based on the filing of the complaints. Finally, the propriety of the removal action itself is amply supported in the record. Management was simply confronted by an employee who refused to perform her duties and who has a documented history of defying supervisory authority. Faced with such an employee, it is difficult to find fault with the agency's removal decision. I therefore find that appellant has shown nothing more than a propensity to file complaints and that she has not established by preponderant evidence that whistleblowing disclosures contributed toward the agency's decision to remove her.

(I.D. at 13-14, App. at A13-14)

Petitioner maintains that the decision of the Administrative Judge that Petitioner did not show that her disclosures were a contributing factor to the Agency's actions is not in accordance with law in that it ignores the clear directives of Congress and the Merit Systems Protection Board, 5 U.S.C. §7703(c)(1), and, in any event, is not supported by substantial evidence. 5 U.S.C. §7703(c)(3). Each of these arguments is fully developed below. However, because of the failure of the Administrative Judge to decide the issue, Petitioner first addresses whether she has, in fact, engaged in whistleblowing.

A. *Petitioner's Disclosures Constitute Whistleblowing.*

Pursuant to 5 U.S.C. §2302(b)(8), whistleblowing is defined as:

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences —

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences —

(i) a violation of any law, rule or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The Administrative Judge, citing the Inspector General's evaluation of Petitioner's complaints, opined that it was "unlikely" Petitioner made any whistleblowing disclosures. (I.D. at p. 13, App. at A13)

As a matter of law, the focus of the Administrative Judge on the Inspector General's evaluation of Petitioner's complaints after investigation is in error. The plain language of the statute indicates the focus is on the reasonable belief of the employee. Obviously, that reasonable belief must be determined from the point in time where the employee makes the allegations and not from some subsequent point in time.

In *Ramos* v. *Federal Aviation Administration*, 4 M.S.P.R. 388, 392 (1980), the Board held that no burden is placed

on the employee to demonstrate that his or her disclosure actually constitutes a violation of a law, rule or regulation, mismanagement, waste of funds, abuse of authority, or a danger to public health or safety. It only is necessary for the employee to show, through documentary evidence or testimony, that he or she had a reasonable belief that the disclosure falls within §2302 (b)(8). Basing a determination on Petitioner's status as a whistleblower on the *post hoc* evaluation of the IG is clear error.

Beginning in the Fall of 1989, Petitioner brought to the attention of both Capt. Demcko and Lt. Col. Phillis the use of so-called "bootleg" software. (Tr. at 456-58, App. at A373-75) Petitioner, perhaps in an inartful form, was alleging that the government was using software in contravention of copyright laws. Capt. Demcko specifically testified that he understood Petitioner to be alleging that software was being used in contravention of the manufacturer's copyright. (Tr. at 110, App. at A261)

In July 1990, Petitioner brought to Capt. Demcko's attention the alleged misuse of government vehicles. Misuse of a government vehicle contravenes 31 U.S.C. §1349(b). The Merit Systems Protection Board has held that misuse of a government vehicle is a serious offense. See, e.g., *Campbell* v. *Department of Health and Human Services*, 40 M.S.P.R. 525 (1989).

In September 1990, Petitioner approached both Capt. Demcko and Ms. Hansen with information that safety shoes were not being purchased in accordance with Agency policy and regulations. (App. at A75-80; Tr. at 484-87, App. at A388-91) In rejecting some of the purchase requisitions, Petitioner attached both the SADA policy and the Army regulation to her rejection slip. (App. at A75-80) The subsequent investigation under the auspices of the IG later confirmed Petitioner's allegations regarding safety shoes. (App. at A173) Ultimately, the IG required corrective action in this area and Capt. Demcko issued new policy guidance on procurement of

safety shoes. (App. at A180-82) The same holds true with respect to Petitioner's allegations regarding safety glasses: the subsequent investigation validated Petitioner's concerns, corrective action was required, and a new procurement procedure was implemented. (App. at A175, A178-79)

The IG further validated Petitioner's contention that SADA was using an obsolete priority code for its requisitions. (App. at A174-75) As a result, SADA was able to utilize the higher "03" priority — a priority which later served, in part, as the basis for Petitioner's removal. Indeed, the new Imprest Fund procedures that led directly to one of the charges at issue were implemented because the investigation into Petitioner's allegations revealed that Ms. Hansen was signing vouchers in advance for use on days when she was absent. (App. at A174; Tr. 223, App. at A285) Mr. Cook received a memorandum of counseling and Lt. Col. Phillis issued a new policy on the sale and distribution of commercial products during duty hours as a result of Petitioner's allegations regarding the sale of AVON products. (App. at A121, A171)

Under these circumstances, it is difficult to see how Petitioner could not have a reasonable belief that her allegations represented a violation of laws, rules and regulations and gross mismanagement. And, it is equally difficult to see how any other reasonable person could not come to the same conclusion.

The Administrative Judge selectively cites the testimony of Lt. Col. Shirley that the complaints were "administrative and procedural" and that he advised Petitioner to work with her supervisor, rather than get the IG involved. (I.D. at 13, App. at A13) Lt. Col. Shirley admitted that he had never seen any dollar amounts attached to the problems Petitioner brought to his attention. (Tr. at 363, 370 App. at A336, A343) He also admitted that if the practices Petitioner brought to his attention were long-standing, they could have cost the government a substantial amount of money. (Tr. at 370-73, App. at A343-46) Finally, Lt. Col. Shirley testified that he also

advised Petitioner's supervisors to work with her on the problems. (Tr. at 374-75, App. at A344-45)

The focus should not have been on Lt. Col. Shirley's opinions of Petitioner's disclosures. It should have been on Petitioner's beliefs that her disclosures constituted whistleblowing, and whether those beliefs were reasonable. To the extent that the focus should have been on the beliefs of anyone else, the Administrative Judge should have considered how Capt. Demcko and Lt. Col. Phillis viewed Petitioner's disclosures. See, *Thompson* v. *Farm Credit Administration*, 51 M.S.P.R. 569, 581 (1991) (employee who did not make protected disclosure is entitled to protection of statute where agency perceived him as a whistleblower). See also, *Special Counsel* v. *Department of the Navy*, 46 M.S.P.R. 274, 278 (1990) ("An employee who does not engage in protected activity may nonetheless be covered by the WPA where a retaliatory personnel action is taken against him based on the belief that he had engaged in protected activity.")

Petitioner clearly proved that her activities were within the ambit of 5 U.S.C. §2302(b)(8).

B. *Petitioner Proved, as a Matter of Law, that Reprisal Was a Contributing Factor in the Agency's Actions.*

Under the Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16 (April 10, 1989), as codified at 5 U.S.C. §1201, *et seq.*, Congress substantially revised the burden of proof placed upon an employee before the Board in pursuing an allegation of reprisal under §2302(b)(8). An employee must demonstrate that the protected disclosures were a contributing factor to the agency's action. 5 U.S.C. §1221(e)(1). Petitioner contends that the decision of the Board's Administrative Judge is not in accordance with law because it ignores the clear directives of Congress in enacting the Whistleblower Protection Act, as well as the Board cases interpreting the Act.

In *McDaid* v. *Department of Housing and Urban Development*, 46 M.S.P.R. 416, 420-21 (1990), the Board summarized the new burdens of proof established by the Whistleblower Protection Act.

> It is clear that Congress viewed the appellant's burden of showing retaliation as too stringent under previous law and the agency's burden of rebuttal as too low and it

No. 93-0515

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JANET M. CLARK,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICI CURIAE REPRESENTATIVES JOHN CONYERS, FRANK McCLOSKEY PATRICIA SCHROEDER, and THE FUND FOR CONSTITUTIONAL GOVERNMENT IN SUPPORT OF PETITIONER

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November 1, 1993

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

No. 93-0515

JANET M. CLARK,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICI CURIAE REPRESENTATIVES JOHN CONYERS, FRANK McCLOSKEY PATRICIA SCHROEDER, and THE FUND FOR CONSTITUTIONAL GOVERNMENT IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici all have a long history of leadership in the principles underlying the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (April 10, 1989)("Act" or "WPA"). Representative John Conyers is Chair of the House Government Operations Committee, which has engaged in active oversight of the public policy consequences from violations of the merit system in general, and

whistleblower laws in particular. Representative Frank McCloskey is Chair of the House Post Office and Civil Service Subcommittee on Civil Service, which has engaged in extensive oversight of the WPA, and is the lead sponsor for currently pending legislation significantly amending the WPA. Until 1989 Representative Patricia Schroeder was Chair of the House Post Office and Civil Service Subcommittee on Civil Service. She also was a leading sponsor of the Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111 (Oct. 13, 1978), including its whistleblower protection provisions.

The Fund for Constitutional Government is a non-profit public charity dedicated, *inter alia*, to fostering constitutional responsibility in the conduct of elected officials.

Amici's efforts on behalf of federal whistleblowers are based on the belief that a professional and dedicated civil service is essential to an effective democracy. Civil servants are a vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions. Whistleblowers serve as the Achilles heel of bureaucratic corruption. Amici believe that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of the federal bureaucracy to the general public, conscientious individuals who wish in good faith to point out illegal or questionable practices must not be forced to choose between their jobs and silence.

SUMMARY OF ARGUMENT

In *Clark* the Federal Circuit functionally erased the affirmative whistleblower defense by permitting that statutory provision, 5 USC 2302(b)(8), to be rendered irrelevant. The decision permits an agency to defeat a prohibited personnel practice claim merely by successfully meeting its burden under 5 USC 7701(c)(1) to defend a personnel action, which must be met whether or not there is an affirmative defense. The Court held that once an agency meets that initial burden it also can receive credit for defeating the nexus element in the whistleblower's *prima facie* defense, and the case is over. It is not even necessary to check for a link between whistleblowing and the challenged personnel action, which can be upheld on its own merits.

Further, the Court canceled the Act's well-established doctrine that a close link between knowledge of protected whistleblowing and taking a personnel action is sufficient to establish the contributing factor, or nexus, element for a *prima facie* case. The Court made that conclusion discretionary, rather than mandatory.

In reaching these results, the Federal Circuit defeated the congressional intent to encourage and protect whistleblowing, erased plain statutory language and defied legislative history establishing Congress' clear intent for implementing both the Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1989.

ARGUMENT

I. THE COURT OF APPEALS FRUSTRATED THE OVERWHELMING CONGRESSIONAL MANDATE THAT WHISTLEBLOWER PROTECTION IS NECESSARY FOR THE PUBLIC POLICY OBJECTIVE OF GUARDING AGAINST FRAUD, WASTE AND ABUSE IN FEDERAL SPENDING PROGRAMS.

By allowing the whistleblower defense to be defeated on grounds independent of protected speech, the Federal Circuit vetoed Congress' overwhelming mandate to guarantee stronger employment protection of whistleblowers. The Circuit's activism violated the long established doctrine that "courts will construe the details of an act in conformity with its dominating general purpose, will read text in light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *S.E.C. v. Joiner*, 320 U.S. 344 (1943).

There can be no serious debate about the legislative policy behind 5 USC 2302(b)(8), the statutory whistleblower defense in both the Civil Service Reform Act of 1978, and the Whistleblower Protection Act of 1989. Since passage of the Reform Act, there has been an increasing legislative consensus that protection of legitimate government whistleblowers is the necessary foundation to challenge illegality, fraud, waste, mismanagement, abuse of authority or public safety threats involving federal programs and activities. Congress highlighted whistleblower protection in the 1978 law

as one of the Reform Act's most visible, significant features.

Prior to passage of the Reform Act, a massive congressional study prepared under the leadership of Senator Patrick Leahy concluded, "The code of silence thwarts top management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Fear of reprisal renders intra-agency communications a sham, and compromises not only the employee, management and the Code of Ethics, but also the Constitutional function of congressional oversight itself." *The Whistleblowers: A Report on Federal Employees who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 42-44).

During the House markup of the legislation, Rep. Patricia Schroeder discussed the potential budgetary impact of subsequently-approved amendments strengthening whistleblower protections in the bill. "I think that the potential savings that an amendment like this might incur to the taxpayers is phenomenal....[I]n the long run, we are going to find that this is one of the most cost-saving amendments we could adopt." *Markup Meetings on H.R. 11280 of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. 22 (1978). Her observations were reaffirmed in the Senate Report accompanying the legislation. "What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who

questions the safety of certain nuclear plants." S. REP. No. 969, 5th Cong., 2d Sess. 8, reprinted in 1978 USCCAN 2725, 2732. As one commentator noted, "The ideological breadth of the coalition supporting whistleblower protection indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing." Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. of ILL. L.R. 615.

If anything, this mandate was intensified by passage of the Whistleblower Protection Act of 1989. While Congress seldom passes any significant legislation unanimously, due to a pocket veto this law was unanimously approved twice in just over five months, along with an earlier unanimous approval in the Senate. 134 Cong. Rec. S10632 (daily ed., Aug. 2, 1988); *id.*, at H9323; *id.*, at S15337; 135 Cong. Rec. S10632 (daily ed., Mar. 16, 1989); and *Id.*, at S2805. Putting the stakes for the new legislation in perspective, in his floor statement Senator Roth expressed frustration with the "massive and perplexing problem of Government waste and fraud...." He added that the problem will not be solved unless civil service employees "exercise their civic duty and report any wrongdoing they see in the workplace." As he warned, however, "[W]e are fooling ourselves if we believe this can occur without having adequate protections in place that will protect those employees who risk their jobs and career to expose the problems of waste and fraud in Government." 134 Cong. Rec. S15337 (daily ed., Oct. 7, 1988). Representative Schroeder explained that the bill more properly should be called the "taxpayer

protection act." *Id.* at H9320.[1]

When President Reagan vetoed the Whistleblower Protection Act of 1988, S. 508, he emphasized ongoing support for the concept while raising constitutional objections to the technical provisions of the legislation. President Ronald Reagan, "Memorandum of Disapproval," (Oct. 26, 1988). President Bush reaffirmed the importance of whistleblowers for accountability when he signed the Whistleblower Protection Act of 1989. 25 *Weekly Compilation of Presidential Documents* (1989): Apr. 10, Presidential Statement and Remarks.

In short, even if well-taken in isolation the Court's analysis in *Clark* cannot be accepted in context. No doctrine may survive that permits cancellation of the whistleblower defense.

II. THE COURT CANCELED PLAIN STATUTORY LANGUAGE THAT THE WHISTLEBLOWER DEFENSE IS AVAILABLE "NOTWITHSTANDING" THE MERITS OF A CHALLENGED AGENCY PERSONNEL ACTION.

The Federal Circuit erred in *Clark* by ignoring clear statutory language defining the boundaries of

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[1] Contrary to the Federal Circuit's observation that reliance on legislative history for the subsequently-vetoed, nearly-identical 1988 version of the Act is "misplaced," *Clark v. Department of the Army*, 997 F.2d at 1472, Congress specifically incorporated the exhaustive legislative history of the 1988 bill into that controlling the Whistleblower Protection Act of 1989. 135 Cong. Rec. 5032, 5033 (1989)(Explanatory statement on S. 20).

an agency's discretion to act. A long-established rule of statutory construction is that, absent ambiguous language, courts must give effect to the clear meaning of all words in a statute. Sutherland, *Statutory Construction*, sections 363, 390, 393, 395 (2d ed. 1904).

The *Clark* decision fails this test. A cornerstone of the Civil Service Reform Act of 1978 was that "notwithstanding" an agency's ability to prove its case on the merits, a personnel action may not be upheld if it is "based on any prohibited personnel practice defense" in section 2302 of Title 5, including whistleblowing. 5 U.S.C. 7701(c)(2)(B). The *Clark* Court obliterated this distinction by allowing an agency to defeat reprisal apples (allegations that an agency acted because of a whistleblowing disclosure) with merits oranges (the employee deserved the action proposed by an agency).

Whether an agency "could" take an action is not the point. Whether an agency "would have" taken the same action in the absence of protected conduct is the question that must be answered. This essential premise repeatedly has been reaffirmed since passage of the Civil Service Reform Act of 1978 for the whistleblower prohibited personnel practice and related provisions shielding protected activity. *See generally* Broida, *A Guide to Merit Systems Protection Board Law and Practice*, 1979-1993 1646-47 (1993).

III. THE COURT DISMISSED LEGISLATIVE INTENT FOR THE EMPLOYEE'S BURDEN TO ESTABLISH A PRIMA FACIE CASE.

A. The merits of an agency's charges against an employee are not relevant to assess whether a prima facie case exists.

Contrary to the Court's holding in *Clark*, the Act's legislative history reinforces plain statutory language that the purpose of establishing a *prima facie* case is to determine whether a personnel action is "tainted" by a link to protected disclosures, *not* whether the employee deserved the sanctions imposed. 135 Cong. Rec. H747 (1989). As the Explanatory Statement for the Act establishes, "Whistleblowing should never be a factor that contributes in any way to an adverse personnel action." *Id.* Indeed, the Administration agreed with this interpretation in a concurring letter from Attorney General Thornburgh introduced into the legislative history: "A 'contributing factor' need not be 'substantial.' The whistleblower's burden is to prove that the whistleblowing contributed *in some way* to the agency's decision to take the personnel action." *Id.*, at H748 (emphasis added).

If an employee meets this burden, the burden of proof shifts to the agency. Only then may an agency argue that it had valid independent grounds for the personnel action. *Id.*, at H747. Under that scenario the agency's arguments are partially relevant to meet its burden of proving it "would have" acted in the absence of protected speech, which must be

demonstrated by "clear and convincing evidence." 5 U.S.C. 1221(e)(2).[2]

B. A link between knowledge of protected speech and timing of an adverse personnel action is sufficient to establish a prima facie case that whistleblowing was a "contributing factor.

The Court also rejected Congress' clearly stated intent that a *prima facie* case may be established by the temporal link between knowledge of protected speech and the personnel action. The Court's explanation was that specific statutory language establishing the knowledge-timing link in the original Senate bill was deleted from S. 20, the version that eventually passed. The Court relieved MSPB Administrative Judges from any mandatory burden to consider this issue. *Clark v. Department of Army*, 997 F.2d. at 1472-73.

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[2] The Merit Systems Protection Board consistently has honored this distinction, holding that it is erroneous for an administrative judge to consider the merits underlying a personnel action in assessing whether an employee has proved that protected whistleblowing was a contributing factor to the action. *Braga v. Department of the Army*, 54 M.S.P.R. 392, 396-97 (1992); *Caddell v. Department of Justice*, 52 M.S.P.R. 529, 533-34, *on remand* 57 M.S.P.R. 508, 512 (1993); *Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183 (1991); *Hebert v. Department of the Navy*, 57 M.S.P.R. 68, 75 (1993). It is well-established that an appellate court may not substitute its own judgement for an administrative agency, which is entitled to deference unless necessary to avoid "absurd results" or other compelling error. *United States v. Turkette*, 452 U.S. 576, 580 (1981), *Baird v. Sonneck*, 944 F.2d 890, 894 (Fed. Cir. 1991); *Bennett v. Department of the Navy*, 699 F.2d 1140 (Fed. Cir. 1983).

The specific statutory language was deleted to eliminate confusion, not to eliminate that particular method of proving a nexus. The concern was that specifically identifying a knowledge-timing test might preclude other valid grounds for meeting the contributing factor test. As the Joint Explanatory Statement controlling the final legislation provides,

> *One of the many possible ways* to show that whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

135 Cong. Rec. H747 (1989)(emphasis added).

The Senate Report emphasized, "The Committee intends for the Board to use this reasonable time standard liberally...." S.Rep. No. 413, 100th Cong., 2d Sess. 14 (1988).

The Court concedes that the MSPB consistently has respected Congress' intent that the knowledge-timing link is a primary way to meet the "contributing factor" burden. *Clark*, 997 F.2d at 1471. If the standard is to be rewritten as discretionary, the change should be adopted by Congress, rather than by the Federal Circuit.

On balance, *Clark* is an example of aberrant judicial activism that cannot coexist with the Act.[3]

CONCLUSION

For the above-stated reasons, a writ of certiorari should be issued to review the actions of the U.S. Court of Appeals for the Federal Circuit in this proceeding.

Respectfully submitted,

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Dated: November 1, 1993

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[3] Indeed, the case flatly contradicts another Federal Circuit decision issued almost contemporaneously. *Marano v. Department of Justice*, — F.2d —, 1993 WL 290043 (Fed. Cir. Aug. 4, 1993). The split must be resolved within the only circuit available for judicial review of an adverse Merit Systems Protection Board decision on an employee's affirmative defense of whistleblowing.

Supreme Court, U.S.
FILED
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No. 93-515

In the Supreme Court of the United States

OCTOBER TERM, 1993

JANET M. CLARK, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination of an administrative judge of the Merit Systems Protection Board that petitioner's "whistle-blowing" disclosures were not a contributing factor in the personnel actions taken against her by her employer.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 997 F.2d 1466. The initial decision of the Merit Systems Protection Board (Pet. App. A17-A36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The petition for a writ of certiorari was filed on September 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner worked for the United States Department of the Army for approximately 26 years. Pet. App. A2, A31. In 1986, while petitioner was a Production Controller, GS-8, at the Savannah Army Depot Activity (SADA), she made a series of complaints to the Army's Office of the Inspector General (OIG) about misuse of government telephones, drinking on the job, and mismanagement of time and materials. *Id.* at A2, A28. Approximately three years later, in mid-1989, petitioner was reassigned to the position of Computer Assistant, GS-8. In July, 1989, Lt. Col. John Phillis, Jr., assumed command at SADA, and in August, 1989, Captain Michael Demcko became Chief of SADA's Mission Division, and one of petitioner's supervisors. *Ibid.* Although neither Lt. Col. Phillis nor Capt. Demcko was a subject of petitioner's previous OIG complaints, they may have been aware of them. *Ibid.*

In May, 1990, SADA was directed to reduce staffing levels. Pet. App. A2, A32. On June 21, 1990, Capt. Demcko identified nine positions, including petitioner's, that would be subject to a reduction-in-force (RIF). *Id.* at A2, A32-A33. Petitioner was informed on August 6, 1990, that her position was being eliminated. *Id.* at A2, A32. She was offered, and she accepted, the position of Supply Clerk and Technician, GS-5, in the Installation Supply Branch of SADA's Mission Division.[1] *Id.* at A2. In September and

[1] Subsequent to the RIF, petitioner filed a complaint with the Office of Special Counsel (OSC), alleging that the RIF abolishing her position was a reprisal for her whistleblowing. Pet. App. A3. By letter dated February 6, 1991, the OSC

October of 1990, after commencing her new duties, petitioner made several complaints to her supervisors and to OIG, including complaints that supplies had been improperly ordered through a local source rather than the central federal supply system, that requisition forms and vendor payments had been improperly processed, that personnel had been inadequately trained, and that an employee had been selling commercial products during work. *Id.* at A2-A3, A28-A29.

On December 6, 1990, the Chief of the Installation Support Division appointed petitioner as the Alternate Imprest Fund Cashier. Pet. App. A3, A18. That position required petitioner to maintain $3,000 in an account to provide imprest fund services in the absence of the primary cashier, and to maintain in the same account adequate additional funds to cover disbursements. *Id.* at A3, A18-A19. On March 1, 1991, the primary cashier told petitioner to sign an interim cash receipt for money for the Imprest Fund. *Ibid.* Petitioner refused. *Id.* at A3, A19. The primary cashier reported petitioner's refusal to petitioner's supervisor, who then instructed petitioner to sign for the funds. *Id.* at A3, A19-21. A heated discussion ensued, and petitioner again refused to sign. *Ibid.*

On March 4, 1991, petitioner's supervisor instructed her in writing to sign for the funds. Pet. App. A3-A4, A21-22. Petitioner acknowledged receipt of the written order, but again refused to comply. *Id.* at A4, A22. The written order placed petitioner on notice that her refusal to sign for the funds would "be

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informed petitioner that it had found no evidence to support her allegation, and that the timing of events made it unlikely that the RIF was a reprisal. *Id.* at A3, A34.

considered insubordination and may be grounds for disciplinary action up to and including removal." *Id.* at A3, A24. Based upon petitioner's refusal to sign for the funds, the supervisor requested that her supervisor, Capt. Demcko, direct petitioner to sign for the money. *Id.* at A4, A22-A23. Capt. Demcko did so, and petitioner complied with Capt. Demcko's order. *Ibid.*[2]

In January, 1991, petitioner received oral and written instructions concerning the need to expedite high priority Desert Storm requisitions by ordering supplies locally if requested. Pet. App. A4, A25-A26. Despite these instructions, petitioner decided to order high priority supplies through the slower federal supply system. *Ibid.* On April 8 and 10, and May 8, 1991, petitioner altered the supply source on four high priority Desert Storm requisition forms without authorization. *Ibid.*

On June 17, 1991, Capt. Demcko proposed petitioner's removal from federal service because of her defiance of authority, her failure to follow instructions and her delay in carrying out instructions. Pet. App. A4. Petitioner complained to the OSC that her proposed removal was in reprisal for whistleblowing. *Ibid.* She requested that the OSC seek a stay of the proposed action from the MSPB, but the OSC declined

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[2] On April 5, 1991, petitioner filed a complaint with the OSC, alleging that she was "threatened" with disciplinary action because of disclosures she had made to OIG. Pet. App. A4. The OSC conducted an investigation, and by letter dated June 5, 1991, informed petitioner that the information she had supplied indicated no connection between the threat and her disclosures; rather, it appeared that her supervisors had threatened her with a disciplinary action in March, 1991, because she had refused to perform her duties. *Ibid.*

to pursue the matter. *Ibid.* After an oral and written reply, Lt. Col. Phillis removed petitioner on July 30, 1991. *Ibid.*

2. Petitioner appealed both her removal for cause and the earlier RIF action to the Merit Systems Protection Board (the Board). See 5 U.S.C. 1221 (Supp. IV 1992). Her appeals were consolidated. On January 17, 1992, the Administrative Judge (AJ) affirmed both actions in an Initial Decision. Pet. App. A17-A36.

The AJ found that petitioner had disobeyed orders and instructions. Pet. App. A18-A28. The AJ found petitioner's explanations for that behavior inconsistent and incredible, and concluded that her removal was warranted to promote the efficiency of the service. *Id.* at A20, A23, A26-A28.

With respect to petitioner's allegations that the RIF and her removal were taken in reprisal for her whistleblowing disclosures, the AJ expressed doubt that petitioner's complaints rose to the level of protected "whistleblowing" under 5 U.S.C. 2302(b)(8) (Supp. IV 1992). Pet. App. A29-A30. He found it unnecessary to address that issue, however, because he concluded that petitioner had not established that her disclosures were a "contributing factor" to the personnel actions. *Ibid.* The AJ explained that most of petitioner's complaints were "directed against her co-workers," that none resulted "in the imposition of disciplinary action against any agency employee," and that none alleged intentional wrongdoing or abuse of authority by her superiors:

> The fact that [petitioner's] disclosures were not personally directed against [her two superiors] renders it less likely that they instituted this

> removal action due to the disclosures. Moreover, record evidence does not show that either individual expressed irritation or a desire to retaliate against [petitioner] based on the filing of the complaints. Finally, the propriety of the removal action itself is amply supported in this record. Management was simply confronted by an employee who refused to perform her duties and who has a documented history of defying supervisory authority. * * * I therefore find that [petitioner] * * * has not established by preponderant evidence that whistleblowing disclosures contributed toward the agency's decision to remove her.

Id. at A30.[3] In light of petitioner's previous record of disciplinary action for insubordination, the AJ also concluded that petitioner's supervisors reasonably concluded that she had no rehabilitation potential. *Id.* at A31. The AJ's initial decision became final on February 21, 1992, when neither party filed a petition for review with the full Board. *Id.* at A5.

3. The court of appeals affirmed. Pet. App. A1-A16. The court first rejected petitioner's claim that the AJ erred by finding it unnecessary to determine whether her disclosures amounted to protected "whistleblowing." The court agreed with petitioner that a complete analysis of an employee's whistleblower defense to an agency's adverse personnel action consists of three steps: First, the AJ must determine

[3] The AJ also rejected petitioner's claim that the RIF action was motivated by whistleblowing, noting that her position had been identified for abolition before her 1990 complaints. Pet. App. A34.

whether the employee's disclosure was protected "whistleblowing" activity under 5 U.S.C. 2302(b)(8) (Supp. IV 1992). Second, the AJ must determine whether the disclosure was a "contributing factor" in the agency's personnel action. See 5 U.S.C. 1221(e)(1) (Supp. IV 1992). And third, if the protected disclosure was a "contributing factor" to the adverse personnel action, the AJ may uphold that action only if the agency proves by "clear and convincing" evidence that it would have taken the same action in the absence of the disclosure. See 5 U.S.C. 1221(e)(2) (Supp. IV 1992). The court of appeals, however, found nothing in either 5 U.S.C. 2302(b)(8) (Supp. IV 1992) or its legislative history mandating any particular sequence of analysis for the statutory issues, and it saw no reason why an administrative judge may not organize his or her work in each case so as to decide only the issues on which the controversy actually turns. Pet. App. A9.

The court next rejected petitioner's contention that the AJ erred in failing to undertake a "knowledge/timing" analysis in order to determine whether petitioner's disclosures were a "contributing factor" in the personnel decision. Under such an analysis, the AJ would be required to determine that the disclosures were a "contributing factor" if petitioner's supervisors had actual or constructive knowledge of her complaints and disclosures when they acted, such that a reasonable person could conclude from the timing alone that the disclosures were a factor in the personnel action. Pet. App. A10. The court agreed with petitioner that in *McDaid* v. *Department of Housing & Urban Dev.*, 46 M.S.P.B. 416, 421 (1990), the Board had interpreted Section 1221(e)(1) to mean

that an employee can prove that whistleblowing was a "contributing factor" merely by showing such knowledge, but the court noted that in doing so the Board had relied on the legislative history of a predecessor bill that would have expressly incorporated that rule into the statute. Because the bill that actually passed omitted that language, the court refused to adopt the *McDaid* interpretation. Pet. App. A10-A13.

Finally, the court of appeals rejected petitioner's claim that the AJ erred in considering the fact that the Army had good grounds for removing her for insubordination, as part of the issue of whether petitioner's whistleblowing was a step-two "contributing factor." The court acknowledged that the third step of the required analysis—whether the agency would have taken the same action absent the whistleblowing—must be proven by the agency by "clear and convincing" evidence. But the court rejected petitioner's claim that the AJ is therefore required to apply that heightened standard of proof whenever the AJ considers the reasons for the agency's action, even when (as here) the AJ finds that evidence logically relevant to the second step of the analysis—whether the employee's whistleblowing was a "contributing factor" in the dismissal.

ARGUMENT

1. Petitioner's principal contention (Pet. 10-23) is that the court of appeals erred in failing to defer to prior decisions of the Merit Systems Protection Board that support each of the three legal arguments she advanced below. Petitioner argues (Pet. 14) that the Board interpretations were entitled to deference under principles of administrative law, because the

Board is the agency charged by Congress with administering the statute.

Petitioner's first legal argument in the court of appeals was that the AJ erred by not making a finding on the question under step one of the statutorily required three-step analysis—whether petitioner's activities constituted protected "whistleblowing" activity—before proceeding to the other two steps of that analysis. The Board's decision in *Braga* v. *Department of the Army*, 54 M.S.P.B. 392, 397 (1992), appears to require that such a finding be made in all cases. The court of appeals rejected that interpretation, however, because "[w]hen we examine the statute, we find that it does not mandate any particular sequence of analysis" (Pet. App. A9). The court also found that petitioner had not "pointed to any legislative history that would require" a particular sequence in which the statutory issues should be decided. The court concluded that "[t]here is no reason why an administrative judge may not assume for purposes of analysis that a petitioner has established the first step, and address the second step first," since, if petitioner fails at the second step, "it is unnecessary, and probably wasteful, to require [the AJ] also to address step one." *Ibid.*

Petitioner next argued in the court of appeals that the AJ failed to use a "knowledge/timing" test in connection with step two of the required analysis. Such a test would permit an employee conclusively to show that whistleblowing was a "contributing factor" in a personnel action by showing "that the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude

that the disclosure was a factor in the personnel action." Pet. App. A10. The Board had interpreted the statute to incorporate such a *per se* "contributing factor" test in *McDaid* v. *Department of Housing & Urban Dev.*, 46 M.S.P.B. 416, 421 (1990). The court of appeals, although recognizing that "[t]here may be cases in which the timing is a factor supporting a conclusion that whistleblowing was a contributing factor" (Pet. App. A13), rejected the *McDaid* interpretation: "The statute contains no 'per se' rule that knowledge of the disclosure and timing of the personnel action automatically satisfies this burden of proof. In fact, such a 'per se' rule was proposed but was deleted [by Congress] before enactment. There can be no clearer manifestation of Congressional intent to avoid a mandatory knowledge/timing test." Pet. App. A12.

Finally, petitioner argued in the court of appeals that the AJ erred in not evaluating the agency's evidence offered to show a legitimate basis for the personnel decision under the "clear and convincing" standard required by step three of the statutory analysis. The AJ had, instead, evaluated this evidence as part of its decision on step two, thus using a more easily satisfied preponderance standard. Pet. App. A13-A14. The court of appeals acknowledged that petitioner's argument here was supported by the Board's interpretation in *Caddell* v. *Department of Justice*, 52 M.S.P.B. 529, 533 (1992). The court rejected that interpretation, however, because it "confuses the weight given to a particular piece of evidence with the burden of proof a party bears on a particular issue." Pet. App. A14.

2. Petitioner also contends (Pet. 25-26) that the court of appeals' decision in this case conflicts with the decision of a different panel of the Federal Circuit in *Marano* v. *Department of Justice*, 2 F.3d 1137 (1993). Petitioner points out that the *Marano* panel relied in part on legislative history that the panel in the present case explicitly rejected. Pet. App. A12. The *Marano* panel also disagreed with the panel in this case on two of the three legal issues raised by petitioner—the applicability of a *per se* timing/knowledge rule in step two and the necessity of using step three's "clear and convincing" evidentiary standard in evaluating an agency's proffered legitimate reasons for a personnel action.

3. The decision of the panel of court of appeals in this case thus explicitly rejects the Merit Systems Protection Board's interpretations of three related procedural and evidentiary provisions of the Whistleblower Protection Act, 5 U.S.C. 1221 *et seq.* (Supp. IV 1992). In doing so, the panel's decision is apparently also in substantial conflict with that of a different panel of the Federal Circuit in *Marano*. The issues thus raised, however, are not appropriate for this Court's resolution at this time. Petitioner in this case did not avail herself of the opportunity to petition the full Board for review of the AJ's initial decision. Such a petition would have given the Board the opportunity to address the conflict between that initial decision and contemporaneous Board interpretations. Nor did petitioner seek rehearing *en banc* in the Federal Circuit so as to afford that court the occasion to resolve the apparent conflict between the panel in this case and the *Marano* panel.

As petitioner suggests (Pet. 23), inconsistent decisions by the Federal Circuit on matters within its exclusive jurisdiction (as to which no inter-circuit conflict can develop) may in some circumstances warrant review by this Court. There is no reason to believe, however, that the Federal Circuit will not reconcile any conflict when given the opportunity. Review by this Court of any important differences in approach between the Board and the Federal Circuit regarding the proper interpretation of the procedural provisions of the Whistleblower Protection Act would also be more appropriate after, rather than before, any such intracircuit conflict is resolved. Finally, as both the AJ and the court of appeals opinions clearly demonstrate, there is unquestionably ample basis in this case for concluding that petitioner's discharge was, in fact, caused by her insubordination rather than any protected whistleblowing activity on her part.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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